DOCKET



No. 13-1075

Title:	United States, Petitioner
	v.
	Marlene June, Conservator
Docketed:	March 7, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-17776)
Decision Date:	December 24, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Mar 7 2014	Petition for a writ of certiorari filed. (Response due April?, 2014)
Mar 28 2014	Order extending time to file response to petition to and including May 7, 2014.
May 7 2014	Brief of respondent Marlene June, Conservator in opposition filed.
May 27 2014	DISTRIBUTED for Conference of June 12, 2014.
May 29 2014	Reply of petitioner United States filed. VIDED. (Distributed)
Jun 16 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 30 2014	Petition GRANTED.
Jul 23 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 9, 2014.
Jul 23 2014	The time to file respondent's brief on the merits is extended to and including November 4, 2014.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, December 10, 2014.
Sep 9 2014	Joint appendix filed. (Statement of costs filed.)
Sep 9 2014	Brief of petitioner United States filed.
Sep 22 2014	Record requested from U.S.C.A. 9th Circuit.
Sep 24 2014	Record received from U.S.C.A. 9th Circuit is electronic and located on PACER.
Nov 4 2014	Brief of respondent Marlene June, Conservator filed.
Nov 7 2014	CIRCULATED.
Nov 10 2014	Brief amicus curiae of Gregory C. Sisk filed. VIDED. (Distributed)
Nov 10 2014	Brief amici curiae of National Center for Law and Economic Justice, et al. filed. (Distributed)
Nov 10 2014	Brief amicus curiae of Arizona Association for Justice/Arizona Trial Lawyers Association filed. (Distributed)
Nov 12 2014	Brief amicus curiae of American Association for Justice filed. VIDED. (Distributed)
Nov 12 2014	Brief amicus curiae of Southeastern Legal Foundation filed. (Distributed)

Nov 12 2014	Brief amicus curiae of Clinic for Legal Assistance to Servicemembers and Veterans filed. (Distributed)
Nov 12 2014	Brief amici curiae of Paralyzed Veterans of America, et al. filed. (Distributed)
Dec 3 2014	Reply of petitioner United States filed.
Dec 10 2014	Argued. For petitioner: Elizabeth Prelogar, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: E. Joshua Rosenkranz, New York, N. Y.
Apr 22 2015	Judgment is AFFIRMED and CASE REMANDED. Kagan, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Scalia and Thomas, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

13-1075

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the two-year time limit for filing an administrative claim with the appropriate federal agency under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant in the district court and the appellee in the court of appeals, is the United States of America.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Marlene June, in her capacity as "Conservator for minor and surviving son of deceased in his own right and on behalf of all statutory beneficiaries conservator for A.K.B. deceased, Anthony Edward Booth." App. *infra*, 1a.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is available at 2013 WL 6773664. The order of the district court (App., *infra*, 3a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 13a-18a.

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA or the Act), 28 U.S.C. 1346(b), 2401(b), 2671-2680. The FTCA "waive[s] the United States' sovereign immunity for claims" against the United States for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). The Act grants the federal district courts "exclusive jurisdiction" over such actions. 28 U.S.C. 1346(b)(1).

The waiver of sovereign immunity is limited in certain respects. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Such an action "shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. 2675(a). And of specific relevance here, if the claim is not "presented in writing to the appropriate Federal agency within two years after such claim accrues," it "shall be forever barred." 28 U.S.C. 2401(b). The requirement that the claim first be presented to the appropriate agency allows the agency with the "best information" to "consider[]" and resolve the claim "without the need for filing suit and possibl[y] expensive and time-consuming litigation." See *McNeil* v. *United States*, 508 U.S. 106, 112 n.7 (1993) (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 3 (1966)).

A plaintiff may not file suit in federal court until the claim is "finally denied by the agency in writing and sent by certified or registered mail," or until six months have passed without the agency making "final disposition" of the claim. 28 U.S.C. 2675(a). A prema-

ture complaint, filed before that six-month period for consideration by the agency has expired, must be dismissed. *McNeil*, 508 U.S. at 110-113. By the same token, if an "action" is not "begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented," the claim "shall be forever barred." 28 U.S.C. 2401(b).

2. On February 19, 2005, Andrew Edward Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in which he was traveling as a passenger crossed a cable median barrier and crashed into oncoming traffic. App., *infra*, 3a-4a. In 2006, respondent, acting as conservator for decedent's minor son, filed a wrongful death action against a contractor and against the State of Arizona for negligently installing and maintaining the median barrier. See D. Ct. Doc. 10, Ex. 1 (Mot. to Dismiss).

3. On December 20, 2010, more than five years after the accident, respondent presented a claim under the FTCA to the Federal Highway Administration (FHWA). C.A. S.E.R. 3. On March 18, 2011, the FHWA denied respondent's claim as untimely. *Id.* at 5.

4. On May 5, 2011, respondent then filed this action in federal court against the United States under the FTCA. Respondent alleged that the United States "negligently failed to comply with its own policies and federal law mandating [that] safety barriers installed" on national highways "undergo crash testing and approval." App., *infra*, 4a.

The United States moved to dismiss for lack of jurisdiction. App., *infra*, 4a. The government argued, *inter alia*, that respondent failed to file a claim with

the FHWA within two years of accrual, and that the suit was therefore barred by 28 U.S.C. 2401. App. *infra*, 5a. The government also argued that the FTCA's two-year limit is not subject to equitable tolling. *Id.* at 7a-9a. Respondent, in turn, moved to amend the complaint to "include additional allegations relevant to the issues of equitable tolling and delayed accrual." *Id.* at 10a (citation omitted). The "additional allegations" (*ibid.*) asserted that respondent did not learn that the FHWA had concerns about the median barriers until 2009, in part because the FHWA declined to make employees available for depositions in the state lawsuit. D. Ct. Doc. 14, at 5-6 (Proposed 1st Am. Compl. ¶ 20).

The district court granted the United States' motion, denied respondent leave to amend, and dismissed the case. App., *infra*, 3a-12a. The court explained that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Id.* at 5a (quoting *Hensley* v. *United States*, 531 F.3d 1052, 1056 (9th Cir. 2008), cert. denied, 556 U.S. 1257 (2009)). The court found that respondent "knew of the injury and its immediate physical cause" on the day of the accident and that "[n]one of the facts relevant to the accrual of [respondent's] claims were unknown to [respondent] or concealed by the United States." *Id.* at 6a.

The district court also rejected respondent's request for equitable tolling. App., *infra*, 7a-9a. The court explained that, in the context of the FTCA's six-month deadline in 28 U.S.C. 2401(b) for filing an action in court after the agency has denied the claim, the Ninth Circuit had recently "determined that the

FTCA's timing requirements are jurisdictional and, as a result, are not subject to equitable tolling." App. *infra*, 8a (citing *Marley* v. *United States*, 567 F.3d 1030, 1037 (9th Cir.), cert. denied, 558 U.S. 1076 (2009)). The court concluded that the same "analysis and holding applies equally to [Section] 2401(b)'s two-year statute of limitations." *Id.* at 8a n.1. Because respondent's "minority" status is also insufficient to "toll the FTCA's time requirements," the court dismissed for "lack of subject matter jurisdiction." *Id.* at 9a.

5. The court of appeals reversed and remanded in an unpublished memorandum decision. App., *infra*, 1a-2a. The court explained that its recent en banc decision in *Wong* v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013), "held that 28 U.S.C. § 2401(b) of the Federal Tort Claims Act is not jurisdictional and that equitable adjustment of the limitations period in that section is not prohibited." App., *infra*, 2a.[1] Although *Wong* involved the FTCA's six-month suit-filing deadline, and not the two-year deadline for first presenting the claim to the agency, the court drew no distinction between the two. "In light of *Wong*," the court reversed and remanded for further proceedings. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has held that the FTCA's two-year time limit to present a tort claim to the appropriate federal agency is subject to equitable tolling. That decision is wrong for two reasons: (i) the two-year deadline is a jurisdictional limitation on the authority

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[1] The United States discusses the en banc decision in *Wong* in more detail in the petition for a writ of certiorari seeking review of that decision, which the United States is filing together with the petition in this case. See note 2, *infra*.

of the district court, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008) (*John R. Sand & Gravel*), and (ii) there are, in any event, "good reason[s]" to think "that Congress did *not* want the equitable tolling doctrine to apply" to the FTCA's time limits, *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). The Ninth Circuit's erroneous decision further perpetuates widespread confusion and conflict in the courts of appeals. As a result of adverse decisions in some circuits, and unsettled law in others, the United States is routinely forced to expend substantial resources litigating fact-intensive assertions of equitable tolling and defending against untimely claims. This Court's intervention is needed to enforce the jurisdictional limitations and mandatory deadlines Congress prescribed, to provide clarity in an area that has been muddled by uncertainty, and to relieve the attendant burdens on the United States and the courts.[2]

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[2] The United States is simultaneously filing a petition for a writ of certiorari raising the same question about the FTCA's six-month deadline for filing a civil action in court. See *United States* v. *Wong* (filed Mar. 7, 2014). The decision below relied exclusively on the Ninth Circuit's en banc decision in *Wong*, which held that the six-month time bar is nonjurisdictional and subject to equitable tolling. 732 F.3d 1030 (2013). Because both time limits are codified in the same provision (28 U.S.C. 2401(b)), because there is substantial overlap in the arguments concerning equitable tolling, and because both questions are important, the United States recommends that the Court grant both petitions and consolidate the cases for briefing and argument.

A. The Two-Year Deadline For Presenting An FTCA Claim To The Appropriate Agency, As A Prerequisite To Filing A Suit In Court, Is Not Subject To Equitable Tolling

The court of appeals erred by holding that the FTCA's two-year time limit for presenting a claim to the appropriate federal agency is subject to equitable tolling. That holding cannot be squared with the statute's text, structure, history, and purpose, and it does not follow from this Court's precedents. The bar to presenting an untimely claim to the agency is a jurisdictional limitation that does not admit of equitable exceptions. *John R. Sand & Gravel*, 552 U.S. at 133-134. But even if that bar were nonjurisdictional, it is nonetheless mandatory and not subject to equitable tolling. That was certainly true at the time of the FTCA's enactment, and it is equally true today.

1. In *John R. Sand & Gravel*, this Court explained that there are two different types of limitations provisions: those that "seek primarily to protect defendants against stale or unduly delayed claims," and those that "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal." 552 U.S. at 133. The former "typically permit courts to toll the limitations period in light of special equitable considerations." *Ibid.* The latter, "sometimes referred to" as "jurisdictional," are often read as "more absolute," such that courts are "forbid[en]" from "consider[ing] whether certain equitable considerations warrant extending [the] limitations period." *Id.* at 133-134. The Court then concluded that the Tucker Act's six-year limitations period is "this second, more absolute kind of limitations period." *Id.* at 134. The same is true here.

a. The text and history of the FTCA evidence Congress's clear intent to enact an absolute, jurisdictional time bar.

In 1946, "after nearly thirty years of congressional consideration," Congress enacted the FTCA, which vested district courts with exclusive jurisdiction to hear tort suits against the United States that fall within the statute's waiver of sovereign immunity. *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953). The FTCA filled a gap left by the Tucker Act, ch. 359, 24 Stat. 505, which as early as 1887 had allowed claims against the United States in "cases for damages not sounding in tort," but had left unaddressed the "large and highly important area" of tort claims for money damages against the sovereign. *Dalehite*, 346 U.S. at 25 n.10. Congress imposed a one-year limitation on the period during which such a tort suit against the United States could be brought: "Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued * * * an action is begun." Federal Tort Claims Act (1946 Act), ch. 753, § 420, 60 Stat. 845.[3]

The text Congress chose for the FTCA's suit-filing bar is the same that it had long used to set deadlines for damages actions against the United States under the Tucker Act. See Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) ("every claim

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[3] If the claim was for less than $1000, it could be "presented in writing to the Federal agency out of whose activities it arises" "within one year after such claim accrued." 1946 Act § 420, 60 Stat. 845. In those cases, the time to file suit was "extended for a period of six months from the date of mailing of notice" of the agency's "final disposition of the claim." *Ibid.*

against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues"); Judicial Code, ch. 231, §156, 36 Stat. 1139; see *John R. Sand & Gravel*, 552 U.S. at 135. And it is the same operative text this Court had repeatedly construed in Tucker Act suits against the United States as jurisdictional and not subject to equitable exceptions. See *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887); *Kendall* v. *United States*, 107 U.S. 123, 125-126 (1883); see also *John R. Sand & Gravel*, 552 U.S. at 134-135 (citing cases); cf. *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898) (construing slightly different wording of Tucker Act in similar fashion); *de Arnaud* v. *United States*, 151 U.S. 483, 495-496 (1894) (same). Moreover, Congress expressly conditioned the grant of "exclusive jurisdiction" to the district courts over tort claims against the United States on the plaintiff's compliance with the time limitation for filing suit. See 1946 Act § 410(a), 60 Stat. 843-844 (granting jurisdiction over tort claims against the United States "[s]ubject to the provisions of this title"); *id.* § 420, 60 Stat. 845 ("this title" included the bar to filing after the one-year period); see *Wong* v. *Beebe*, 732 F.3d 1030, 1055-1056 (9th Cir. 2013) (Tashima, J., dissenting).

The 1946 Congress thus surely intended to limit the FTCA's waiver of sovereign immunity from suits for money damages to be paid out of the federal Treasury by foreclosing federal courts from exercising jurisdiction to adjudicate untimely actions. Based on this Court's longstanding precedent at that time, it

had every reason to believe that its intent would be effectuated.

b. The question, then, is whether anything has changed between 1946 and today to warrant a different result. There have been changes, but the court of appeals was wrong to think that they alter the outcome.

First, in the general recodification of Title 28 in 1948, the FTCA's jurisdiction-granting provision was codified in Chapter 85 of Title 28 and most of the FTCA's other provisions were codified in Chapter 171. See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2671-2680, 62 Stat. 933, 982-985. The jurisdictional provision was accordingly reworded to make jurisdiction "subject to chapter 17[1] of this title." *Id.* § 1346(b), 62 Stat. 933.[4] The FTCA's one-year suit-filing period was codified in Chapter 161. *Id.* § 2401(b), 62 Stat. 971.

In *Wong*, the court of appeals relied on the fact that the time bars are no longer placed in a portion of the Code that addressed jurisdiction. 732 F.3d at 1042-1044. But this Court has repeatedly made clear that changes resulting from the 1948 recodification—including changes in the Tucker Act's limitations provision that the Court has held to be jurisdictional—should not be given any substantive significance in statutory interpretation. See *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chap-

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[4] As enacted, the reference was to Chapter 173, not Chapter 171; that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

ter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."). Indeed, the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, which this Court has repeatedly held to be a jurisdictional limitation, is set forth in a different chapter of Title 28 (Ch. 165) than the statutory provision, 28 U.S.C. 1491, that confers jurisdiction on the Court of Federal Claims, (Ch. 97). Accordingly, the current placement of the FTCA's time bars is not probative of any intent by Congress to expand the district court's jurisdiction to hear FTCA actions.

Second, Congress has since amended the FTCA by extending the suit-filing period to two years, Act of Apr. 25, 1949 (1949 Act), ch. 92, § 1, 63 Stat. 62; adding a mandatory requirement of prior presentation of the claim to the appropriate federal agency, Act of July 18, 1966, Pub. L. No. 89-506, § 2(a), 80 Stat. 306; and restructuring the time bars to account for that mandatory exhaustion, *id.* § 7, 80 Stat. 307. The time bars are now linked directly to the provisions governing prior presentation of claims to the agency, which are themselves treated as jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993) (affirming dismissal for lack of jurisdiction where tort action was prematurely filed before expiration of six-month period following presentation of claim to agency); *Wong*, 732 F.3d at 1047; *Mader* v. *United States*, 654 F.3d 794, 805-808 (8th Cir. 2011); see 28 U.S.C. 1346(b)(1) (District court jurisdiction is "[s]ubject to the provisions of chapter 171 of this title."); 28 U.S.C. 2675(a) (codified in Ch. 171). And the relevant statutory text remains unchanged. 28 U.S.C. 2401(b) ("shall be forever barred"). In the intervening years, this Court again reaffirmed in *Soriano* v. *United States*, 352 U.S.

270 (1957), that the parallel Tucker Act limitations period is jurisdictional, that "conditions upon which the Government consents to be sued must be strictly observed," and that "exceptions thereto [will not] be implied." *Id.* at 271, 273, 276. The amendments to the FTCA following that reaffirmation thus reinforce the jurisdictional nature of the time bar.

Third, this Court has sought in recent years "'to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius* v. *Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regional*) (quoting *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011)). Although the Court has looked for a "clear statement" that a "rule is jurisdictional," it has not required "magic words." *Ibid.* (citing *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515-516 (2011)). "[C]ontext, including this Court's interpretation of similar provisions," is "probative of whether Congress intended a particular provision to rank as jurisdictional." *Ibid.* (quoting *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010)). And "Congress is free to attach the conditions that go with the jurisdictional label to a rule that [the Court may] prefer to call a claim-processing rule." *Henderson*, 131 S. Ct. at 1203; see *Lozano* v. *Alvarez*, No. 12-820 (Mar. 5, 2014) slip op. 8 ("[W]hether equitable tolling is available is fundamentally a question of statutory intent.").

That is precisely what Congress did here. Section 2401(b) contains emphatic language ("shall be forever barred") that was patterned after the jurisdictional limitation on Tucker Act suits (*John R. Sand & Gravel*, 552 U.S. at 134-139) and historically linked to the FTCA's jurisdiction-granting provision (see pp. 8-9, *supra*). Moreover, like the limitations period in the

Tucker Act, the FTCA's time bars "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve * * * broader system-related goal[s]." *John R. Sand & Gravel*, 552 U.S. at 133. They "limit[] the scope of a governmental waiver of sovereign immunity," *ibid.*, and they do so for actions against the United States itself for money damages, which are at the very core of the sovereign's immunity from suit. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979) (FTCA "waives the immunity of the United States and * * * in construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended."); cf. *Wong*, 732 F.3d at 1046 n.12 (acknowledging that this Court's more recent cases on jurisdiction "were not lawsuits in federal court against the federal government" for money damages and may not implicate "parallel sovereign immunity concerns").

The FTCA "governs the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. As this Court recognized in *McNeil*, "[t]he interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command." *Ibid.* Because the FTCA's two-year limitation for presenting a claim to the appropriate federal agency is thus a "more absolute," "jurisdictional" time bar, it is not subject to equitable tolling. See *Auburn Regional*, 133 S. Ct. at 824 (if a time bar is "jurisdictional," there can "be no equitable tolling"). The court of appeals erred in holding otherwise.[5]

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[5] Although this Court has not considered whether the FTCA's time limits are jurisdictional, for decades after the FTCA's enactment, the courts of appeals uniformly characterized them as such

2. The court of appeals erred in subjecting the FTCA's two-year time bar to equitable tolling for a further reason. As the court of appeals recognized in *Wong*, even if a limitations period "is not jurisdictional, tolling may still be precluded." 732 F.3d at 1038; see *Auburn Regional*, 133 S. Ct. at 826-828 (finding that nonjurisdictional statutory time limit is not subject to equitable tolling). In *Wong*, the court applied a presumption in favor of equitable tolling to the FTCA's six-month deadline for filing a suit in court. 732 F.3d at 1047-1051 (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). That presumption is not directly applicable to the adjudication of a claim presented to a federal agency. Cf. *Auburn Regional*, 133 S. Ct. at 827-828 (holding that *Irwin* presumption did not apply to provider administrative appeals under the Medicare program). But even if a presumption in favor of equitable tolling were applicable, there are, in any event, "good reasons to believe that Congress did *not* want the equitable

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and attached jurisdictional consequences to untimely filings. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248 (1st Cir. 1990); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1988); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-742 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991); *Simon* v. *United States*, 244 F.2d 703, 704-706 (5th Cir. 1957); *Allgeier* v. *United States*, 909 F.2d 869, 871 (6th Cir. 1990); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Schmidt* v. *United States*, 901 F.2d 680, 683 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991); *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Adkins* v. *United States*, 896 F.2d 1324, 1325, 1326 (11th Cir. 1990) (per curiam); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

tolling doctrine to apply" to Section 2401(b). *Brockamp*, 519 U.S. at 350.

a. In *Irwin*, this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. The en banc Ninth Circuit in *Wong* applied a "particularly strong" form of that presumption to the FTCA's six-month deadline for filing suit in federal court. 732 F.3d at 1047-1048. The court below relied exclusively on *Wong* without acknowledging the quite distinct context of presenting a claim to a federal agency. App., *infra*, 2a.

As the Court explained in *Auburn Regional*, "*Irwin* itself, and equitable-tolling cases [the Court has] considered both pre- and post-*Irwin*, have generally involved time limits for filing suit in federal court." 133 S. Ct. at 827. In such cases, "a suit" against the United States may in appropriate circumstances be treated the same as "a suit" against a private person —absent a good reason to think Congress intended otherwise. *Irwin*, 498 U.S. at 95-96. Courts then would "render[] in the first instance the decision whether equity required tolling." *Auburn Regional*, 133 S. Ct. at 827.

The same is not true here. An FTCA claim must first be presented to a federal agency, not a court. See 28 U.S.C. 2675(a). If equitable tolling were available, an agency confronted with a facially untimely claim would be faced with the dilemma of having to decide whether to: (1) deny the claim outright because it is time barred (and thereby assume the risk that a court might override the time bar through equitable tolling), (2) conduct its own evaluation of possi-

ble tolling (an unfamiliar and potentially burdensome task for which the agency would not have relevant information of the sort Congress expected it to have concerning the merits of the claim), or (3) evaluate the merits and possible settlement of the time-barred claim along with the tolling issue because of the prospect that a court might later find equitable tolling appropriate (thereby diverting agency resources from the review of timely claims and complicating the administrative review process). If the agency chose the straightforward option of simply denying the claim because it is time barred, as Congress no doubt expected it would do, but a court later found equitable tolling appropriate and then proceeded to the merits of the claim, the agency would be denied the "fair opportunity to investigate and possibly settle the claim" and have to "assume the burden of costly and time-consuming litigation." *McNeil*, 508 U.S. at 111-112. The "interest in the orderly administration of this body of litigation" (*id.* at 112) would be undermined by importing into this framework for presentation of claims to an administrative agency a presumption in favor of equitable tolling that was intended to apply to ordinary statutes of limitations governing suits in court. Cf. *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) (Courts should not "read the laws of Congress through the distorting lenses of inapplicable legal doctrine.").

b. In any event, even if a presumption in favor of equitable tolling applies in some form, that presumption is overcome here.

Many of the reasons set forth above demonstrate that, even if not strictly jurisdictional, the two-year time bar is still not subject to equitable tolling. Con-

gress used particularly "emphatic" language. *Brockamp*, 519 U.S. at 350; 28 U.S.C. 2401(b) ("[A] tort claim against the United States" is extinguished—"*forever barred*"—if not presented to the agency within two years.). (emphasis added). Congress modeled the FTCA's two-year suit-filing deadline on the limitations period in the Tucker Act that was (and is) not subject to equitable tolling. See pp. 8-9, 12, *supra*. And Congress enacted (and amended) Section 2401(b) decades before "this Court decided *Irwin* and therefore" could not have been "aware that courts, when interpreting [the FTCA's] timing provisions, would apply" a presumption in favor of equitable tolling. *Holland* v. *Florida*, 560 U.S. 631, 646 (2010).

There are further reasons to conclude that Congress did not intend courts to apply general principles of equitable tolling to FTCA claims. During the decades-long process of drafting the FTCA, several of the bills introduced in Congress either contained a "reasonable cause" exception, a savings provision that tolled the time for filing an action during periods of disability (such as infancy or mental incompetency), or both.[6] That such exceptions were "absent from the Act itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon

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[6] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1932); S. 4567, 72d Cong., 1st Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st Sess. §§ 202(a), 304 (1926); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926).

the language of the earlier bills." *United States* v. *Muniz*, 374 U.S. 150, 155-156 (1963).[7]

Three years after enacting the FTCA, when the one-year period that triggered the time bar proved to be too short, Congress extended the period to two years—again, without allowing for any tolling. See 1949 Act § 1, 63 Stat. 62. Nor did Congress provide for any case-specific exceptions until 1988 when, to remedy the inequity of a plaintiff's timely claim being barred because she sued the wrong party, Congress provided for a limited form of tolling—but only in specifically delineated circumstances. See 28 U.S.C. 2679(d)(5). And while a neighboring subsection (28 U.S.C. 2401(a)) provides for delayed accrual of another limitations period in the case of certain legal disabilities, Section 2401(b) notably does not. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Moreover, the presentation of a tort claim to a federal agency seeking money from the Treasury, to be followed by an action at law against the United States

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[7] As with the Tucker Act, the remedy for individual cases of hardship was to come from Congress in the form of private bills, not from the courts. See *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940) ("If unusual cases of hardship arise, the claimant may still have recourse to a private bill, over which the claims committee would have jurisdiction.") (statement of Alexander Holtzoff, Special Assistant to the Att'y Gen.); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (noting that there are "private bills" under the Tucker Act and that there would "undoubtedly" be "private bills" under the FTCA) (statement of Alexander Holtzoff); see *Kosak* v. *United States*, 465 U.S. 848, 856 (1984) (describing "Judge Holtzoff" as "one of the major figures in the development of the [FTCA]").

in court for money damages, is not an "area of the law where equity finds a comfortable home." *Holland*, 560 U.S. at 647; see *id.* at 646 (finding presumption "strength[ened]" by "the fact that equitable principles have traditionally governed the substantive law of habeas corpus") (internal quotation marks and citation omitted); *Young* v. *United States*, 535 U.S. 43, 50 (2002) (finding *Irwin* presumption appropriate "when [Congress] is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and 'appl[y] the principles and rules of equity jurisprudence'") (citation omitted); cf. *Brockamp*, 519 U.S. at 352 (noting that tax law "is not normally characterized by case-specific exceptions reflecting individualized equities"). And the two-year period, which begins to run only when the claim "accrues" (28 U.S.C. 2401(b)), already builds in some added protection for plaintiffs. See *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998); *Kubrick*, 444 U.S. at 121 (A medical malpractice claim "accrue[s]" under 28 U.S.C. 2401(b) when a plaintiff knows or should have known of both the "injury and its cause.").

In the end, under the regime adopted by the Ninth Circuit, a broad spectrum of federal agencies would be forced "to respond to, and [sometimes] litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, * * * turn out to lack sufficient equitable justification." *Brockamp*, 519 U.S. at 352. Given the "broader system-related goal[s]" at stake, *John R. Sand & Gravel*, 552 U.S. at 133, including the need to examine and adjudicate a "vast multitude" of FTCA claims, *McNeil*, 508 U.S. at 112, that additional burden provides yet another reason why Congress would "have

wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so." *Brockamp*, 519 U.S. at 353.

B. The Ninth Circuit Decision Further Perpetuates Widespread Confusion And Conflict Among The Courts Of Appeals

Review of the Ninth Circuit's decision in this case is warranted to restore the mandatory and jurisdictional force of the FTCA's time bars. For decades after the FTCA's enactment, the courts of appeals uniformly understood the time bars in Section 2401(b) as jurisdictional and attached jurisdictional consequences to untimely filings. See note 5, *supra*. They were correct to do so, for all the reasons set forth above.

More recently, however, some courts of appeals have reconsidered (and, at times, ignored) that settled circuit precedent in light of intervening decisions of this Court. The issue has recurred with remarkable frequency. And the current state of the law can be best described as widespread conflict and confusion. The Ninth Circuit decision relying on *Wong* (which itself reverses prior circuit precedent) exacerbates that confusion and the untoward consequences of introducing a regime of equitable tolling into the interlocking system of administrative and judicial review that Congress established to "govern[] the processing of a vast multitude of claims." *McNeil*, 508 U.S. at 112. This Court's intervention is needed.

Categorizing the courts of appeals cases is no easy matter, but they can generally be divided into four groups. Three courts of appeals (including the Ninth Circuit) have now recently held that FTCA time bars

are nonjurisdictional and are subject to equitable tolling. See App., *infra*, 1a-2a; *Wong*, *supra* (sixth-month court filing deadline); *Arteaga* v. *United States*, 711 F.3d 828 (7th Cir. 2013) (two-year deadline for presentation of claim to agency); *Santos* v. *United States*, 559 F.3d 189 (3d Cir. 2009) (two-year deadline for presentation of claim to agency).

Four other courts of appeals now hold or (perhaps) suggest, in conflict with the three circuits just discussed, that the FTCA time limits are jurisdictional—but then hold that they are nevertheless subject to equitable tolling. See *T.L.* v. *United States*, 443 F.3d 956, 959-961, 963-964 (8th Cir. 2006) (holding two-year deadline "jurisdictional" but subject to equitable tolling); *Sanchez* v. *United States*, 740 F.3d 47, 53-54 (1st Cir. 2014) (noting that it had "previously opined that the FTCA's timeliness requirements are jurisdictional," while at the same time "assum[ing] that equitable tolling can be applied to those deadlines"); *Kokotis* v. *USPS*, 223 F.3d 275, 278, 280-281 (4th Cir. 2000) (describing two-year administrative filing deadline as "jurisdictional," but then considering argument for equitable tolling on its merits); *Harvey* v. *United States*, 685 F.3d 939, 947 (10th Cir. 2012) ("court lacks subject matter jurisdiction to proceed under the FTCA if a plaintiff fails to satisfy the FTCA's timing requirements set forth in [Section] 2401(b)") (citation omitted); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994) (assuming arguendo that court may equitably toll six-month court filing deadline). That position cannot be reconciled with this Court's decisions concluding that a jurisdictional time bar is not subject to equitable exception or tolling. See *John R.*

Sand & Gravel, 552 U.S. at 133-134; *Auburn Regional*, 133 S. Ct. at 824.

Three circuits have expressly declared the question open and declined to decide it. See *Phillips* v. *Generations Family Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013); *Motta* v. *United States*, 717 F.3d 840, 846 (11th Cir. 2013); *Norman* v. *United States*, 467 F.3d 773, 776 (D.C. Cir. 2006).

Two other circuits have conflicting case law that is difficult to reconcile. Compare *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185, 190-191 (5th Cir. 2011) (describing FTCA time limits as "jurisdictional" and not subject to equitable tolling) and *Young* v. *United States*, 727 F.3d 444, 447 & n.8 (5th Cir. 2013) (same), with *Perez* v. *United States*, 167 F.3d 913, 915-917 (5th Cir. 1999) (two-year deadline not jurisdictional and subject to equitable tolling); see also *Bazzo* v. *United States*, 494 Fed. Appx. 545, 546-547 (6th Cir. 2012) (noting conflicting precedents); *Glarner* v. *United States*, 30 F.3d 697, 700-701 (6th Cir. 1994) (holding that two-year deadline is nonjurisdictional and subject to equitable tolling).

The current state of the law is thus unsettled and in a state of flux. The uncertainty has persisted for some time. That state of affairs continues to impose a substantial burden on agencies, on courts, and on the United States Treasury. This Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for briefing and argument with *United States* v. *Wong*, petition for cert. pending (filed Mar. 7, 2014).

Respectfully submitted.

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MARCH 2014

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-17776
D.C. No. 2:11-cv-00901-SRB

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Arizona

MEMORANDUM*

Submitted: Dec. 20, 2013**
Filed: Dec. 24, 2013

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: THOMAS and MCKEOWN, Circuit Judges, and BENNETT, District Judge.***

Plaintiff Marlene June, acting as conservator for A.K.B., ("June") appeals the district court's judgment in favor of the United States. We have jurisdiction pursuant to 28 U.S.C. § 1291 and reverse and remand. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

After the district court entered judgment, an en banc panel of this Court held that 28 U.S.C. § 2401(b) of the Federal Tort Claims Act is not jurisdictional and that equitable adjustment of the limitations period in that section is not prohibited. *Wong v. Beebe*, —F.3d—, 2013 WL 5539621 (9th Cir. 2013) (en banc), *overruling Marley v. United States*, 567 F.3d 1030 (9th Cir. 2009). In light of *Wong*, we must reverse the district court's contrary ruling and remand for further proceedings consistent with this disposition.

We need not, and do not, reach any other issue urged by the parties on appeal.

REVERSED AND REMANDED.

*** The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 11-901-PHX-SRB

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Filed: Nov. 1, 2011

ORDER

The Court now considers Defendant the United States of America's Motion to Dismiss ("Def.'s Mot.") (Doc. 10). The Court also resolves Plaintiff Marlene June's Motion for Leave to File First Amended Complaint ("Pl.'s Mot. to Am.") (Doc. 13).

I. BACKGROUND

On February 19, 2005, Anthony Edward Booth was killed in an automobile accident on Interstate 10 in Phoenix, Arizona, after the vehicle in which he was traveling

passed through a cable median barrier and crossed into oncoming traffic. (Doc. 1, Compl. ¶¶ 9-14.) Plaintiff Marlene June, acting as conservator for A.K.B., the minor surviving son of Anthony Edward Booth, brings the instant action under the Federal Tort Claims Act ("FTCA"). *(Id.* ¶¶ 1, 19.) Plaintiff asserts that the cable median barrier on Interstate 10 failed and permitted the vehicle Mr. Booth was traveling in to collide with another vehicle, resulting in Mr. Booth's death. *(Id.* ¶ 14.) Plaintiff alleges that the United States negligently failed to comply with its own policies and federal law mandating that safety barriers installed on National Highway System roadways undergo crash testing and approval pursuant to the National Cooperative Highway Research Project Report 350. *(Id.* ¶ 29.) Plaintiff also asserts a claim for negligence per se, alleging that the United States violated its own federally mandated safety rules and regulations. *(Id.* ¶¶ 34-35.) The United States now moves to dismiss Plaintiff's claims pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that this Court does not have jurisdiction over Plaintiff's claims because the claims are barred by the FTCA's jurisdictional statute of limitations and that the Federal Aid Highway Act does not provide for a private cause of action. (Def.'s Mot. at 1, 3-11.)

II. LEGAL STANDARDS AND ANALYSIS

A. Standard Under Rule 12(b)(1)

The plaintiff, as the party asserting jurisdiction, has the burden of showing that he or she has alleged facts potentially within the FTCA's waiver of immunity. *Prescott v. United States*, 973 F.2d 696, 701 (9th Cir. 1992);

see also Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983) ("The party who sues the United States bears the burden of pointing to such an unequivocal waiver of immunity."). On a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, jurisdictional facts may be proved by "affidavit, declaration, or any other evidence properly before the court, in addition to the pleadings challenged by the motion." *Green v. United States*, 630 F.3d 1245, 1248 n.3 (9th Cir. 2011). A plaintiff need only make a prima facie showing of subject matter jurisdiction where the question of jurisdiction is decided based on the written materials. *Singh v. United States*, 718 F. Supp. 2d 1139, 1141 (N.D. Cal. 2010).

B. Defendant's Motion to Dismiss

The United States is generally immune from suit and "can be sued only to the extent that it has waived its immunity." *United States v. Orleans*, 425 U.S. 807, 814 (1976). Subject to certain exceptions, the FTCA provides a limited waiver of sovereign immunity for tort claims arising out of the negligence of federal employees and agencies where a claim would exist under state law if the United States were a private party. 28 U.S.C. § 1346(b); *see also Terbush v. United States*, 516 F.3d 1125, 1128-29 (9th Cir. 2008). Under the FTCA, tort claims against the United States are barred unless they are presented to the federal agency whose conduct is challenged "within two years after such claim[s] accrue[]." 28 U.S.C. § 2401(b); *see also Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir. 2001).

1. Accrual of Plaintiff's Claims

A tort action against the United States accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action." *Hensley v. United States*, 531 F.3d 1052, 1056 (9th Cir. 2008) (internal quotation marks and citation omitted). Generally, "ignorance of the involvement of government employees is irrelevant to accrual of a federal tort claim," and "accrual does not await a plaintiff's awareness, whether actual or constructive, of the government's negligence." *Id.* Even where the government remains silent concerning its possible negligence, the accrual of a claim is not delayed and the statute of limitations is not tolled in the absence of fraudulent concealment. *Id.* at 1057 (citing *Dymiewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984)).

Plaintiff alleges that the claims asserted here "accrued no earlier than April 29, 2009." (Compl. ¶ 23.) However, the injury giving rise to Plaintiff's claim occurred on February 19, 2005. (*Id.* ¶¶ 9-14.) None of the facts relevant to the accrual of Plaintiff's claims were unknown to Plaintiff or concealed by the United States following the accident. *See Hensley*, 531 F.3d at 1056 (noting that ignorance of the government's involvement "is irrelevant to accrual of a federal tort claim"). Plaintiff knew of the injury and its immediate physical cause on February 19, 2005, and Plaintiff's claim accrued at that time. *See Hensley*, 531 F.3d at 1057 (finding that, following an automobile accident, the plaintiffs' injuries and the actual cause were immediately apparent and that a claim against the United States was time-barred even where the plaintiffs did not learn until much later that a

government actor caused the injury); *Dyniewicz*, 742 F.2d at 487 (holding that a wrongful death claim against the United States accrued when the plaintiffs "knew both the fact of injury and its immediate physical cause," regardless of the plaintiffs' "ignorance of the involvement of United States employees"). Plaintiff did not file a claim with the appropriate federal agency within two years of the date on which the claims accrued as required under the FTCA. *See* 28 U.S.C. § 2401(b); *Winters*, 244 F.3d at 1090; (Compl. ¶¶ 9-14, 16.)

2. Tolling the Statute of Limitations

Plaintiff argues that, even if the claims at issue accrued more than two years before Plaintiff filed a claim with the appropriate federal agency, the FTCA's statute of limitations is not jurisdictional and is tolled until A.K.B. reaches the age of majority. (Doc. 15, Pl.'s Resp, & Opp'n to Def.'s Mot. ("Pl.'s Resp.") at 8-9; Compl. ¶¶ 17-18.) Plaintiff also asserts that "the concealment of material facts by the Defendant will generally toll the statute of limitations." (Compl. ¶¶ 22.)

Generally, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterens Affairs*, 498 U.S. 89, 95-96 (1990). However, where a statute of limitations "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as . . . limiting the scope of a governmental waiver of sovereign immunity," the time limitation is generally considered jurisdictional and is not subject to waiver or equitable tolling. *John R. Sand &*

Gravel Co. v. United States, 552 U.S. 130, 133-34 (2008). The FTCA's statute of limitations is considered a condition of the United States' waiver of sovereign immunity, and courts cannot "extend the waiver beyond that which Congress intended." *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979). The Ninth Circuit Court of Appeals has determined that the FTCA's timing requirements are jurisdictional and, as a result, are not subject to equitable tolling or waiver. *Marley v. United States*, 567 F.3d 1030, 1037 (9th Cir. 2009) ("[B]ecause § 2401(b) is jurisdictional, [courts] must refrain from using equitable estoppel or equitable tolling to excuse . . . untimeliness.").[1] The *Marley* court noted that, unlike 28 U.S.C. § 2401(a), § 2401(b) does not contain any exceptions to its time limitations, and courts cannot create any exceptions to the time requirements established in § 2401(b). *Marley*, 567 F.3d at 1037. Where a claim is not filed within the FTCA's statute of limitations, federal courts are "deprive[d] . . . of jurisdiction," and the claim must be dismissed. *Id.* at 1038.[2] In addition, even

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[1] While the *Marley* court considered 28 U.S.C. § 2401(b)'s six-month time limitation, requiring that a plaintiff file a claim in federal court within six months of a final agency denial of the claim, the *Marley* analysis and holding applies equally to § 2401(b)'s two-year statute of limitations. *See Marley*, 567 F.3d at 1037-38; *see also Banares v. Demore*, 417 F. App'x 638, 639 (9th Cir. 2011) (applying the *Marley* holding to the two-year statute of limitations under § 2401(b)).

[2] Plaintiff cites *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996), and *Aloe Vera of America v. United States*, 574 F.3d 1176 (9th Cir. 2009), and argues that the Ninth Circuit Court of Appeals recognizes that equitable tolling applies to the FTCA's statute of limitations. (Pl.'s Resp. at 3-5.) However, the *Marley* court

were tolling permitted, "[t]he time limitation for FTCA claims is not tolled during a claimant's minority." *Papa v. United States*, 281 F.3d 1004, 1011 (9th Cir. 2002).

Here, as discussed above, Plaintiff's claims were raised outside of the applicable time limitations established by the FTCA. *(See* Compl. ¶¶ 9-14, 16.) The FTCA's time requirements are jurisdictional and are not subject to equitable tolling. *See Marley*, 567 F.3d at 1037-38. In addition, A.K.B.'s minority does not toll the FTCA's time requirements. *See Papa*, 281 F.3d at 1011. Accordingly, Plaintiff's claims are dismissed for lack of subject matter jurisdiction. *See Marley*, 567 F.3d at 1038.

The United States also argues that Plaintiff's claims must be dismissed because the Federal Aid Highway Act does not provide for a private cause of action. (Def.'s Mot. at 1, 9-11.) Because Plaintiff's claims are barred by the FTCA's statute of limitations, the Court does not reach this argument.

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found that the decision in *Alvarez-Machain* was not binding precedent, and explicitly held that the FTCA's statute of limitations was jurisdictional. *See Marley*, 567 F.3d at 1037-38. In addition, the Ninth Circuit Court of Appeals withdrew the *Aloe Vera* opinion cited by Plaintiff and submitted an amended opinion in which the court found that the statute of limitations at issue was jurisdictional under *John R. Sand*. *See Aloe Vera*, 574 F.3d 1176 (withdrawing original opinion); *Aloe Vera*, 580 F.3d 867, 872 (finding the applicable statute of limitations was jurisdictional). The *Marley* court's holding that the FTCA's time limitations are jurisdictional and not subject to equitable tolling is binding precedent and is not disturbed by the case law referenced by Plaintiff.

C. Plaintiff's Motion for Leave to File a First Amended Complaint

On August 12, 2011, Plaintiff moved for leave to file a first amended complaint in order to "include additional allegations relevant to the issues of equitable tolling and delayed accrual" and "to remove references to Arizona state law on the issues of accrual and tolling." (Pl.'s Mot. to Am. at 2.) Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend should be freely granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). However, where amendment would be futile, a court may properly deny leave to amend. *United States* ex *rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001).

Here, Plaintiff cannot amend the Complaint to avoid the jurisdictional bar created by the FTCA's statute of limitations. As discussed above, Plaintiff knew of the injury and its cause on February 19, 2005, and Plaintiff's claim accrued at that time. *See supra* Part II.B.1. In addition, the FTCA's time requirements are jurisdictional and not subject to equitable tolling. *See supra* Part II.B.2. Plaintiff's Motion for Leave to File First Amended Complaint is, therefore, denied. *See SmithKline Beecham*, 245 F.3d at 1052 ("Futility of amendment can, by itself, justify the denial of a motion for leave to amend." (internal quotation marks and citation omitted)).

D. Dismissal with Prejudice

Generally, claims dismissed for lack of subject matter jurisdiction are dismissed without prejudice so that a plaintiff may reassert the claims in the appropriate court.

Frigard v. United States, 862 F.2d 201, 204 (9th Cir. 1988). However, "the bar of sovereign immunity is absolute," and, where a plaintiff cannot redraft his or her claims in order to avoid the FTCA's limitations, dismissal with prejudice is appropriate. *Cf. id.* (finding that dismissal with prejudice was appropriate where the plaintiffs could not redraft their claims to avoid the exceptions to the FTCA's waiver of liability). Plaintiff's claims are barred by the FTCA's statute of limitations, and Plaintiff cannot amend the Complaint to avoid the jurisdictional bar created by the FTCA's statute of limitations. Therefore, Plaintiff's claims are dismissed with prejudice.

III. CONCLUSION

While Plaintiff pursues claims based on a tragic loss, the significance of the loss does not alter the law governing the jurisdiction of this Court. Plaintiff's claims are barred by the FTCA's jurisdictional statute of limitations.

IT IS THEREFORE ORDERED granting Defendant the United States of America's Motion to Dismiss (Doc. 10) and dismissing Plaintiff Marlene June's claims with prejudice.

IT IS FURTHER ORDERED denying Plaintiff Marlene June's Motion for Leave to File First Amended Complaint (Doc. 13).

IT IS FURTHER ORDERED directing the Clerk of Court to enter judgment of dismissal with prejudice in this matter.

DATED this 1st day of November, 2011.

/s/ SUSAN R. BOLTON
SUSAN R. BOLTON
United States District Judge

APPENDIX C

1. 28 U.S.C. 1346(b)(1) provides:

United States as defendant

* * * * *

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not

reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

4. 28 U.S.C. 2679(d) provides:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or pro-

ceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be sub-

ject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

OPPOSITION BRIEF

No. 13-1075

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whenever Congress enacts a statute of limitations, it does so with a "presumption of equitable tolling" in mind. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Congress enacted the Federal Tort Claims Act ("FTCA") with the "broad and just purpose ... to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1955). It provides a vehicle for such a victim to sue the government in federal court but requires that she first present her claim to the responsible federal agency.

The question presented is:

Did the court of appeals here correctly hold, consistent with every one of the eight other circuits to have decided the issue, that the FTCA's time limit for presenting administrative claims may be equitably tolled in appropriate cases?

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. It was Defendant in the district court and was Appellee in the court of appeals.

Respondent is Marlene June, in her capacity as conservator for A.K.B., a minor child entitled under Arizona law to seek relief for the wrongful death of Anthony Booth. June was Plaintiff in the district court and was Appellant in the court of appeals.

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OPINIONS BELOW

The district court's opinion is unpublished. It is reprinted at Pet. App. 3a-12a.[1]

The opinion of the court of appeals is unpublished. It is available at 2013 U.S. App. LEXIS 25,657. And it is reprinted at Pet. App. 1a-2a.

JURISDICTION

The court of appeals issued its judgment on December 24, 2013. Pet. App. 1a. The United States filed a timely petition for a writ of certiorari on March 7, 2014. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act's statute of limitations provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

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[1] We use "Pet. App." for the Petition Appendix and "Dkt. __" for docket entries in the district court.

STATEMENT OF THE CASE

In enacting the Federal Tort Claims Act ("FTCA"), Congress provided a "broad and just" mechanism "to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing Co. v. United States*, 350 U.S. 61, 68 (1953). Congress envisioned that the FTCA would be applied with "equity ... to the claimants." H.R. Rep. No. 79-1675, at 25 (1945). And this Court has instructed lower courts not to act "as ... self-constituted guardian[s] of the Treasury" by interpreting it in a way that unduly limits that compensatory purpose. *Indian Towing*, 350 U.S. at 69. Consistent with these precepts, the court of appeals unanimously held that, in appropriate circumstances, equity may operate to toll the FTCA's limit on the time that a victim has in which to initiate an FTCA case by presenting a claim for relief to the administrative agency responsible for his injury.

1. Before 1946, victims of torts committed by the federal government generally could not seek judicial relief. This Court had held that federal courts lacked subject-matter jurisdiction to entertain suits against the United States except in situations where Congress had so authorized, and Congress had not generally authorized tort actions. Alexander Holtzoff, *The Handling of Tort Claims against the Federal Government*, 9 L. & Contemp. Probs. 311, 311 (1942). As a result, tort victims had to petition Congress to enact "private bills": victim-specific "laws" individually tailored to provide case-specific compensation. *Id.*

Congress came to view the job of processing proposed private bills as a nuisance. After all, the legislature's role was to engage in "ample debate and consideration of matters of national and international importance." H.R. Rep. No. 79-1675, at 24. And "[p]rivate claims bills ... take ... congressional time from consideration of national affairs." *Id.* Also, on the merits, Congress believed that it was "poorly equipped to serve as a ... tribunal for the settlement of private claims against the Government of the United States." *Id.* at 25.

Accordingly, to unburden itself and to better serve victims of governmental torts, in 1946, Congress enacted the FTCA. Pub. L. No. 79-601, §§ 401-24, 60 Stat. 812, 842-47 (1946). "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities." *Indian Towing*, 350 U.S. at 68.

The FTCA granted federal district courts exclusive jurisdiction to hear suits filed by victims of torts against the United States. Pub. L. No. 79-601, § 410(a), 60 Stat. at 843-44. The FTCA required victims to bring such suits within one year from the date on which their claims accrued. *Id.*, § 420, 60 Stat. at 845. But if the victim elected to first present an administrative claim for relief to the appropriate federal agency within one year from accrual, then he would have until six months after the agency's disposition (even if that date was later than one year from accrual) to begin an action in federal court. *Id.* Congress expected that this regime would be applied

with "equity ... to the claimants." H.R. Rep. No. 79-1675, at 25.

In 1948, Congress decoupled the jurisdictional grant from the FTCA's time limitations. Congress made the jurisdictional grant "[s]ubject to the provisions of chapter 17[1] of [title 28 of the U.S. Code]."[2] Pub. L. No. 80-773, 62 Stat. 869, 933 (1948). And it placed only some of the FTCA's provisions in that chapter. It placed the section containing time limits in chapter 161. *Id.*, 62 Stat. at 971.

In 1949, Congress adopted new time limits. It granted victims two years from accrual in which to sue straightaway. Pub. L. No. 81-55, § 1, 63 Stat. 62, 62 (1949). And it provided that, if a victim chose to first present an administrative claim for relief, he would have until six months after the disposition of that claim so long as that claim was presented within two years of accrual. *Id.* Congress wanted these time limits to operate "in consonance with the practice prevailing in analogous departments of the law," *i.e.*, with the operation of state-law and federal-law time limits for filing negligence actions against private parties that "ha[d] been tested and found satisfactory in the laboratory of legal experience." H.R. Rep. No. 81-276, at 3-4 (1949).

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[2] Although the amendment itself purported to make the jurisdictional grant subject to the provisions of chapter "173," in reality there was no such chapter, and Congress quickly corrected the scrivener's error. Pub. L. No. 81-55, § 2(a), 63 Stat. 62, 62 (1949).

In 1966, Congress amended the FTCA again to require (rather than merely permit) victims to present administrative claims to the responsible federal agency before filing suit. Pub. L. No. 89-506, § 2(a), 80 Stat. 306, 306 (1966). Along with that, it enacted the statute of limitations that is in force today:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented.

Id., § 7, 80 Stat. at 307 (codified at 28 U.S.C. § 2401(b)).

2. This case involves a tort claim seeking recovery for the death of Anthony Booth. He died because the Federal Highway Administration ("FHWA") permitted a defective cable median barrier to be installed on a stretch of Arizona's Interstate 10 highway.

Cable median barriers are a vitally important component of highway safety. A cable median barrier consists of steel wire ropes mounted on flexible posts laid out along the median of a highway that divides traffic traveling in one direction from traffic traveling in the other. *See* FHWA, *Median Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/median_barriers/median_barriers.pdf (last visited May 7, 2014). The primary purpose of the barrier is to ensure that, if a

driver loses control of his vehicle, it will not stray into oncoming traffic in such a way as to cause a head-on collision. *See id.* The cable median barrier does this by flexibly redirecting the vehicle back into its lane and, short of that, by absorbing most of the energy of a crash and minimizing the forces on the vehicle. *See id.* Properly functioning cable median barriers are so effective that they have reduced cross-median crash fatalities by more than 90 percent. FHWA, *Cable Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/cable_barriers/cable_barriers.pdf (last visited May 7, 2014).

In 2000, however, the FHWA permitted the installation of a defective cable median barrier along a stretch of Interstate 10 in Phoenix. Dkt. 14 at 2. At the time of installation, the barrier had not passed the FHWA's required "crashworthiness" testing. *Id.* Indeed, it had not even been crash tested. *Id.* The FHWA knew this. *Id.* at 5.

On February 19, 2005, Laquitha Green was driving a car on Interstate 10, with Booth as a passenger. *Id.* at 3. Green lost control of the car, and the car veered toward oncoming traffic. *Id.* The cable median barrier, if properly functioning, would have redirected the car away or at the very least absorbed most of the energy of a crash so as to minimize the force felt by the occupants. *See id.* It did not. *Id.* The car crossed into oncoming traffic and collided with another vehicle. *Id.* Booth and Green both were killed. *Id.*

In August 2005, that same cable median barrier that failed to protect Booth and Green was crash tested. *Id.* at 5. It failed. *Id.* In September 2005, the FHWA issued a public memorandum representing that Interstate 10's cable median barrier had been approved as crashworthy. *Id.* It had not been. *Id.* The FHWA knew this. *Id.*

Shortly thereafter, Respondent Marlene June, as conservator for Booth's minor child A.K.B., filed a wrongful-death action against the state of Arizona. *Id.* During the course of that litigation, June's counsel sought to depose certain FHWA personnel in order to discover information relevant to the condition of the cable median barrier. *Id.* Beginning in early 2007, and continuing through a portion of 2009, Petitioner refused to make them available. *Id.*

3. It was not until April 2009 that Petitioner finally made those employees available for deposition. *Id.* For the first time, June's counsel learned, among other things, that Petitioner permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing. *Id.*

On December 20, 2010, June began the process of seeking relief against Petitioner pursuant to the FTCA by presenting a wrongful-death claim to the FHWA. *Id.* at 6. In March 2011, the FHWA denied June's administrative claim. *Id.* at 7. In May 2011, within six months of that final denial, she filed this lawsuit against Petitioner. Dkt. 1 at 1.

Petitioner moved to dismiss on the ground that the district court lacked subject-matter jurisdiction. Petitioner contended that the time limit for presenting administrative claims was jurisdictional and that June missed that deadline. Dkt. 10 at 3-9. Specifically, Petitioner argued that claim accrued on February 19, 2005, the date of Booth's fatal accident, but noted that June did not present her administrative claim to the FHWA until December 20, 2010. *Id.*

June contended that the two-year time limit should be equitably tolled in light of Petitioner's concealment of the defective condition of the cable median barrier contributed to Booth's death. Dkt. 15 at 1-8. She argued that her claim was timely presented because she presented it within two years of when she learned about Petitioner's negligence in April 2009. *Id.*

The district court granted Petitioner's motion. Pet. App. 3a-12a.[3]

4. The court of appeals reversed. *Id.* at 1a-2a. The court explained that, under governing circuit precedent, the FTCA's six-month time limit for filing suit in federal court may be equitably tolled in appropriate circumstances. *Id.* at 2a. On that basis, it held that the FTCA's two-year time limit for presenting administrative claims can be equitably tolled in

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[3] The district court did not address Petitioner's alternative argument (Dkt. 10 at 9-11) that the court lacked jurisdiction because the Federal-Aid Highway Act did not allow June to pursue her action on the basis of the FHWA's negligent permission of the installation of the defective cable median barrier.

certain situations, as well, and remanded the case to the district court. *Id.*

REASONS FOR DENYING THE PETITION

The decision of the court of appeals in favor of recognizing the availability of equitable tolling of the time limit for the presentment of an administrative claim under the FTCA is correct and is consistent with rulings of eight other court of appeals that have reached the issue. The circuits that have not reached the issue have also supported tolling in this context. This unanimous view is amply supported by this Court's precedent establishing a presumption in favor of equitable tolling. Congress has not taken any steps to reject this long prevailing view of the FTCA. Thus, there is no need for this Court to address this statutory issue. The petition should be denied.

I. THE RULING OF THE COURT OF APPEALS IS CONSISTENT WITH THE UNIFORM VIEW OF THE EIGHT OTHER CIRCUITS THAT HAVE DECIDED THE ISSUE.

A. The Circuits Agree That Equity Can Toll The FTCA's Time Limit For Presenting An Administrative Claim To The Relevant Federal Agency.

In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), this Court held that, when Congress enacts a statutory cause of action, there is a "presumption of equitable tolling" of the statutory time

limit for asserting a claim. *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (explaining that statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations"). This Court has held the "presumption of equitable tolling applicable ... against the United States," because Congress is likely to view such tolling as "amount[ing] to little, if any, broadening of the congressional waiver" of the government's sovereign immunity. *Irwin*, 498 U.S. at 95-96. Thus, it comes as little surprise that all of the nine circuits that have reached the issue "explicitly agree or simply take it as given that equitable tolling defenses are applicable in the context of the FTCA" time limit for presenting administrative claims. *Rakes v. United States*, 442 F.3d 7, 25 (1st Cir. 2006); *see Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007) ("Courts of appeals that have addressed whether equitable estoppel is a defense to the FTCA's statute of limitations have assumed that it is.").

The government's petition asserts "widespread conflict and confusion" mandating this Court's resolution. Pet. 20. The reality, however, is that *every one* of the circuits that has ruled on the issue has held that, in appropriate circumstances, a court may employ its equitable powers to toll the FTCA's time limit for presenting administrative claims. The government's petition concedes as much. It admits that the Third, Seventh, and Ninth Circuits have "held that [the claim-presentment time limit] ... [is] subject to equitable tolling." Pet. 20-21. Likewise, the petition states that the First, Fourth, Eighth, and Tenth Circuits "hold that [the claim-presentment

time limit is] ... subject to equitable tolling." Pet. 21. The petition further concedes that the Fifth Circuit, too, has held the "two-year deadline ... subject to equitable tolling." Pet. 22. And, finally, the petition recognizes that the Sixth Circuit has "h[e]ld[] th[e] two-year deadline ... subject to equitable tolling," as well. *Id.*

That is it. All nine courts of appeals that have reached the issue have all held that the two-year statutory period is subject to equitable tolling. There is no conflict on the question presented.[4]

Petitioner suggests (Pet. 20-21) that review is needed because some of the nine unanimous circuits refer to the FTCA time limit as "jurisdictional" while others do not. All of those nine courts of appeals, however, read the FTCA as not to preclude equitable tolling. All of the courts have properly looked at whether its language, history, and purpose recognize a role for equitable tolling. They all answer the question presented "Yes." Thus, all nine circuits

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[4] Indeed, even the circuits that have not formally reached the issue indicate that tolling is proper. The three circuits (the Second, Eleventh, and D.C. Circuits) that have encountered the issue but "have expressly declared the question open and declined to decide it" (Pet. 22) have assumed for the sake of argument that tolling applies. *See, e.g., Phillips v. Generations Family Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013); *Motta ex rel. A.M. v. United States*, 717 F.3d 840, 846-47 (11th Cir. 2013); *Norman v. United States*, 467 F.3d 773, 776 (D.C. Cir. 2006). Further, the one circuit (the Federal Circuit) that has not encountered the issue has nevertheless suggested in a related context that the time limit "is ... subject to equitable tolling in appropriate cases." *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785, 795 n.2 (Fed. Cir. 2009).

have reached the same conclusion, and there simply is no material conflict.

That Petitioner here is asking this Court to review and reject the uniform agreement of all of the circuits that have decided the question presented is unusual. It is doubly strange given that the petition presents only a statutory issue. Eugene Gressman et al., *Supreme Court Practice* 505 (9th ed. 2007). If the unanimous view of the nine circuits is contrary to what the legislature intended, Congress always "remains free to alter what [the lower courts] have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989). There is simply no need for this Court to step into this statutory context and to disrupt the status quo.

Moreover, experience has shown that Congress pays close attention to the FTCA, and to the time limit for presenting administrative claims. As Petitioner recognizes (Pet. 8-10, 17-18), and as we have explained in detail (*supra* pp. 2-5), Congress has been more than willing to debate and revisit features of the presentment requirement. Following the FTCA's enactment, Congress enacted legislation relating to the presentment requirement at least five times. *See, e.g.*, Pub. L. No. 100-694, § 6, 102 Stat. 4563, 4564 (1988); Pub. L. No. 89-506, § 2(a), 80 Stat. at 306; Pub. L. No. 86-238, § 1(3), 73 Stat. 471, 472 (1959); Pub. L. No. 81-55, § 1, 63 Stat. at 62; Pub. L. No. 80-773, 62 Stat. at 933. In 1988, Congress acknowledged that the two-year limit is not absolute and inflexible by expressly recognizing an exception for a particular class of cases. Pub. L. No. 100-694, § 6, 102 Stat. at 4565 (codified at 28 U.S.C.

§ 2679(d)(5)). And as Petitioner implicitly acknowledges, Congress has been on notice for at least 20 years that the courts of appeals have been permitting equity to toll the claim-presentment period under certain circumstances. Pet. 22 (citing *Glarner v. United States*, 30 F.3d 697, 700-02 (6th Cir. 1994)).

Petitioner, unable to obtain this change through legislation for the past 20 years, now asks this Court to step in and do what it could not convince Congress to do: amend the FTCA to reject the unanimous view of the nine circuits that have reached the issue of tolling. In this context, review of this statutory issue is not warranted, and the petition should be denied.

B. Petitioner's Claim of Conflict Within The Fifth And Sixth Circuits Does Not Withstand Scrutiny And In Any Event Does Not Merit Review.

While every circuit in the country that has addressed the issue has ruled that equitable tolling applies to the FTCA's time limit for presenting administrative claims, Petitioner asserts that this Court's review is urgently needed because within the Fifth and Sixth Circuits there is "case law that is difficult to reconcile." Pet. 22.

Petitioner has not actually identified any problematic "conflicting case law" within those circuits. As Petitioner notes, the governing rule in the Fifth Circuit is set forth in *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999). There, the court of appeals unambiguously held that equitable tolling applies. Pet. 22. The so-called "conflicting" precedents within

the Fifth Circuit cited by the petition are *Young v. United States*, 727 F.3d 444 (5th Cir. 2013) and *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185 (5th Cir. 2011). Neither, however, creates any sort of intra-circuit "conflict[]." *Young* did not decide the issue presented in this case. Instead, it addressed only the narrow question of "whether state law"—specifically Louisiana's "continuing tort" doctrine—"may indefinitely postpone the commencement of the running of prescription when the wrongful acts and damages are ongoing." 727 F.3d at 447. And in the end, *Young* "d[id] not reach" an answer even to that narrow question, because "the tortious acts that plaintiffs allege[d] d[id] not constitute a continuing tort under Louisiana law." *Id.* The Fifth Circuit's decision in *FEMA Trailer* does not conflict with *Perez*, either. While *Perez* dealt with whether equitable tolling applied to the time limit for presenting administrative claims after such claims had "accrue[d]" within the meaning of the FTCA, *FEMA Trailer* decided the antecedent issue of whether "the accrual of [the plaintiff's] claim was delayed or tolled" by various alleged impediments. 646 F.3d at 189.

Nor is there any meaningful friction within the Sixth Circuit. As Petitioner concedes, the governing rule in the Sixth Circuit as stated in *Glarner*, 30 F.3d at 702, is that the FTCA "two-year deadline is ... subject to equitable tolling." Pet. 22. Petitioner claims that the Sixth Circuit's subsequent unpublished decision in *Bazzo v. United States*, 494 F. App'x 545 (6th Cir. 2012), identifies "conflicting precedents." Not so. The only so-called "precedent[]" (as opposed to unpublished opinions that do not bind

the Sixth Circuit's district courts) that *Bazzo* characterizes as "conflicting" is that court's per curiam ruling in *Rogers v. United States*, 675 F.2d 123 (6th Cir. 1982) (per curiam). *Bazzo*, 494 F. App'x at 546. *Rogers*, however, decided only whether equity can ever excuse a victim's failure to present any administrative claim at all prior to filing suit in court (and held that it cannot). 675 F.2d at 124. Accordingly, the Sixth Circuit has cited *Rogers* in a precedential opinion only where the plaintiff "concede[d] that he did not first present the claim to the appropriate federal agency" prior to suing. *Singleton v. United States*, 277 F.3d 864, 872 (6th Cir. 2002). In any event, to the extent that *Rogers* can be read as saying anything about equitable tolling of the time limit for presenting an administrative claim, *Rogers* did not have the benefit of this Court's landmark equitable-tolling decision in *Irwin*, which was not handed down until a full eight years later.

But even if substantiated, the claimed intra-circuit discord does not merit this Court's review of this statutory issue. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957); *see Davis v. United States*, 417 U.S. 333, 340 (1974) (noting denial of certiorari in an earlier case despite acknowledged intra-circuit conflict concerning interpretation of criminal statute).

II. THE UNIFORM VIEW OF THE NINE CIRCUITS IS CORRECT.

A. The FTCA's Language, History, And Purpose Support The Presumption In Favor Of Permitting Equitable Tolling Of The Time Limit For The Presentation Of An Administrative Claim.

"It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted). Inconsistency with the text of the relevant statute requires more than just mere perceived or actual tension; this Court "will 'not construe a statute to displace courts' traditional equitable authority absent the clearest command.'" *Holland v. Florida*, 560 U.S. 631, 646 (2010) (quoting *Miller v. French*, 530 U.S. 327, 340 (2000)). This understanding of time limits is so deeply embedded in the law that "Congress must be presumed to draft limitations periods in light of this background principle." *Young*, 535 U.S. at 49-50.

As all of the courts of appeals to have decided the question recognize, this presumption applies with full force to the FTCA's time limit for presenting administrative claims. *See, e.g., Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013) (Posner, J.); *Santos v. United States*, 559 F.3d 189, 194 (3d Cir. 2009); *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 280-81 (4th Cir. 2000) (Wilkinson, C.J.); *Perez*,

167 F.3d at 915-16; *Glarner*, 30 F.3d at 701. This Court has held that "the same rebuttable presumption of equitable tolling applicable ... against private defendants should also apply ... against the United States." *Irwin*, 498 U.S. at 95-96; *see Bowen v. City of New York*, 476 U.S. 467, 480 (1986); *Honda v. Clark*, 386 U.S. 484, 500 (1967). And the statute itself expressly provides that the government in an FTCA action "shall be liable ... in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, "confirm[ing]" the presumption, *Arteaga*, 711 F.3d at 833. *See also Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957).

The fact that this case involves the context of administrative-claim process renders the presumption even stronger than in the context of a court action. "[T]he ... presumption of equitable tolling ... appl[ies] to *suits* against the United States" because Congress is likely to view such tolling as "amount[ing] to little, if any, broadening of the congressional waiver" of the government's sovereign immunity. *Irwin*, 498 U.S. at 95-96 (emphasis added). Congress certainly would view the equitable tolling of a time limit for presenting administrative claims even more favorably. This is because presenting a claim to an administrative agency does not directly and immediately result in the United States being brought into court, whereas filing a suit against the United States does.

Congress crafted the time limit on presenting administrative claims with equity in mind, as well. It specifically intended to make its time limit "con-

sonan[t] with the practice prevailing in analogous departments of the law," *i.e.*, with the operation of state-law and federal-law time limits for filing negligence actions against private parties that "ha[d] been tested and found satisfactory in the laboratory of legal experience." H.R. Rep. No. 81-276, at 3-4 (1949). Those time limits were overwhelmingly viewed as subject to equitable exceptions in certain situations.[5]

Only "the clearest command" can rebut the presumption in favor of equitable tolling, *Holland*, 560 U.S. at 646, and the FTCA's text, structure, and purpose all point to the conclusion that equitable tolling applies to the time limit for presenting administrative claims.

Language. By its terms, the FTCA does not purport to prohibit a court from equitable tolling of the time limit for presenting administrative claims. To the contrary, this Court has found that materially identical statutory language supports equitable tolling.

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[5] *See, e.g.*, *Pashley v. Pac. Elec. Co.*, Civ. 14,291, 1944 Cal. App. LEXIS 1376, at *5 (Cal. Ct. App. May 19, 1944) ("It is the general rule that a fraudulent concealment by defendant of the facts upon which a cause of action is based tolls the statute of limitations ...."); *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944) ("It is generally held that fraudulent concealment stops the running of the statute." (emphasis omitted)); *Kurry v. Frost*, 162 S.W.2d 48, 51 (Ark. 1942) ("According to the majority rule, ... fraudulent concealment of a cause of action from the one in whom it resides, by the one against whom it lies, constitutes an implied exception to the statute of limitations ...." (internal quotation marks omitted)).

Consider the Racketeer-Influenced Corrupt Organizations Act's ("RICO") provision for civil actions. RICO is primarily a criminal statute designed to help the government prosecute ongoing criminal enterprises. *See* 18 U.S.C. §§ 1961-62. A provision of the act, known colloquially as "civil RICO" also permits victims of such criminal enterprises to file civil suits against the "racketeers." *Id.* § 1964. Civil RICO's statute of limitations provides that "[a]ny action to enforce a cause of action under [civil RICO] shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987) (explaining that civil RICO incorporates the limitations period of the antitrust-related Clayton Act). This Court held that equity can toll the civil RICO time limit for filing suit. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997). The key language of the FTCA's time limit for presenting administrative claims—that a tort claim "shall be forever barred unless" it is presented within two years of accrual—is identical to the key language of civil RICO's equitable time limit for filing suit, which this Court held does not preclude tolling.

This Court's interpretation of the Federal Employers Liability Act ("FELA") supports this conclusion, as well. FELA gives railroad workers a cause of action to sue their employers in order to recover damages caused by their employers' negligence. 45 U.S.C. § 51. Its statute of limitations provides that "[n]o action shall be maintained ... unless commenced within three years from the day the cause of action accrued." *Id.* § 56. This Court has held that

equitable tolling applies to FELA's time limit for filing suit. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234-35 (1959). The FTCA's time limit for presenting administrative claims is materially identical. FELA's time limit on filing suit states a deadline by which a task must be done (three years in which to file an action), and it explains the consequences of failing to meet it ("[n]o action shall be maintained"). So does the FTCA's time limit on presenting administrative claims. It states a deadline by which a task must be done (two years in which to present a claim), and it explains the consequences of failing to meet it (the claim "shall be forever barred").

Structure. The FTCA's structure likewise supports case-appropriate tolling. This Court has stated that when it comes to time limits, the fact that "a separate provision ... prescribes the jurisdiction of the ... [c]ourt" "suggests Congress regard[s] the [time] limit as a claim-processing rule" of the sort routinely held subject to equitable tolling on a case-by-case basis. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011). This is especially true when the separate provisions are also located in separate chapters. That "Congress elected not to place the [time] limit in the ... subchapter [relating to jurisdiction]" further suggests that the time limit is not one of the inflexible parts of the statutory scheme that rejects equitable considerations. *Id.*

That describes the FTCA. The FTCA separates the time limit for presenting administrative claims from the grant of jurisdiction. Congress placed them not only in different sections of title 28 (the former in

section 2401 and the latter in section 1346), but in different chapters (the former in chapter 161 and the latter in chapter 85, entitled "District courts; Jurisdiction"). And while the Congress made the FTCA's grant of jurisdiction "[s]ubject to" various other provisions, the time limit for presenting administrative claims is not one of them. 28 U.S.C. § 1346(b)(1). The grant of jurisdiction is "[s]ubject to" only "the provisions of chapter 171 of [title 28]." *Id.* As noted immediately above, however, the time limit for presenting administrative claims is contained in chapter 161. Moreover, the claim-presentment "limitation provision [is] separate from the waiver of sovereign immunity section," *i.e.*, section 2674, further confirming that the "freestanding" time limit readily incorporates equitable concerns. *Santos*, 559 F.3d at 197.

Purpose. The other evidence illuminating Congress's purpose in enacting the time limit for presenting administrative claims further supports that it intended equitable tolling to apply when appropriate circumstances called for it. Equity was part and parcel of the FTCA as a whole from Day One. From the outset, a clear goal of the FTCA generally was to ensure that the compensation regime it created would be applied "with justice and equity ... to the claimants." H.R. Rep. No. 79-1675, at 25 (1945). And, as explained above (*supra* pp. 17-18 & n.5), Congress avowedly desired that the FTCA's time limits operate "in consonance with" limitations periods that readily accommodated equitable considerations.

Additionally, equity must play a role because Congress contemplated FTCA administrative claim presentment to be an informal process that "laymen, unassisted by trained lawyers, [could] initiate.'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). "[T]he claim does not have to be the equivalent of a fully drafted complaint." Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 17.09[2] (2013). The victim need only provide enough information to give the responsible agency enough notice to begin its own investigation. *Id.* Today, victims can meet this requirement by a completing a one-and-a-half page form, called an "SF-95," that "usually is available at most post offices." *Id.* As far as submission of the claim is concerned, the victim need not "file" or even "lodge" it with the responsible agency; he need only "present" it—a "textually weaker" requirement. *Perez*, 167 F.3d at 918 & n.2. And if he "presents" it to the wrong agency, that agency will "transfer it forthwith to the appropriate agency ... and advise the claimant of the transfer." 28 C.F.R. § 14.2(b)(1). These "more informal agency procedures ... make it easier for many claimants to file claims and secure relief without the assistance of an attorney." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong. 14 (1966) (statement of Hon. John W. Douglas, Assistant Attorney General).

There is no reason to believe that Congress wanted to bar tolling in this informal administrative claim-processing context.

B. Petitioner's Counterarguments Fail To Establish A Clear Congressional Intent To Categorically Bar Equitable Tolling.

1. As noted above (*supra* pp. 18-20), this Court has on multiple occasions held that, in appropriate circumstances, equity can toll time limits materially identical to the FTCA's time limit for presenting administrative claims. Petitioner argues, however, that because this Court in *John R. Sand & Gravel* construed the similarly worded time limit of the Tucker Act (28 U.S.C. § 2501)—the statute authorizing non-tort actions against the government for money damages—not to permit tolling, the same result is required for the FTCA. Pet. 9, 11.

But this Court's sui generis treatment of the Tucker Act is not probative here. In the very case Petitioner cites, the Court went out of its way to make clear that the Tucker Act's time limit owes its jurisdictional status not to its language or purpose but to "[b]asic principles of *stare decisis*" relating to prior Tucker Act cases. *John R. Sand & Gravel*, 552 U.S. at 139. As Petitioner notes, in the late 1800s, this Court found the Tucker Act's time limit to be jurisdictional. Pet. 9 (citing *Kendall v. United States*, 107 U.S. 123, 125-26 (1883)). And going forward, rather than examining the issue anew, this Court has consistently relied upon that "previously provided ... definitive interpretation" (rather than its own independent functional analysis) to sustain the Tucker Act time limit's jurisdictional status. *John R. Sand & Gravel*, 552 U.S. at 137. Indeed, the Court has explained that its 130-year-old interpretation carries so much force that it likely would prevent the Court

from changing course even if the Court came to "believe that decision is no longer 'right'" as an original matter. *Id.* at 139. As Petitioner recognizes, however, there is nothing even approximating such historical pedigree with respect to the FTCA, as "this Court has not considered whether the FTCA's time limits are jurisdictional." Pet. 13 n.5. Moreover, this Court has made clear that, as a matter of text, the "language" of the Tucker Act's time limit does not "manifest a ... congressional intent ... [against] the availability of equitable tolling." *Irwin*, 498 U.S. at 95. Accordingly, any linguistic similarity with the Tucker Act "is irrelevant to equitable tolling." *Perez*, 167 F.3d at 916.

2. Turning to the FTCA's structure, Petitioner cannot deny that the Act today belies any intent to render the time limit for presenting administrative claims "jurisdictional." As explained above (*supra* pp. 4, 21), that limit is not one of the aspects that the FTCA's grant of jurisdiction today is "[s]ubject to." Additionally, it is "separate from the [FTCA's] waiver of immunity." *Santos*, 559 F.3d. at 197. Petitioner, however, would have this Court ignore the current statutory framework and declare the time limit on presenting administrative claims jurisdictional based upon the structure of the statute as enacted in 1946. Pet. 9.

The structure of the statute in 1946 does not suggest that the time limit for presenting an administrative claim was jurisdictional then or today. Indeed, the 1946 Congress plainly did not intend the time limit for presenting administrative claims to be jurisdictional, because it did not even make claim-

presentment mandatory. Thus, the time limit was hardly jurisdictional.

3. As a matter of legislative purpose, Petitioner asserts that the time limit for presenting administrative claims never can yield to the forces of equity because it "'seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve ... broader system-related goal[s].'" Pet. 13 (quoting *John R. Sand & Gravel*, 552 U.S. at 133). Petitioner proffers two such "goal[s]": "examin[ing] and adjudicat[ing] a vast multitude of FTCA claims," Pet. 19 (internal quotation marks omitted), and "'limit[ing] the scope of a governmental waiver of sovereign immunity,'" Pet. 13 (quoting *John R. Sand & Gravel*, 552 U.S. at 133).

That the FTCA claim-presentment process involves a sizeable amount of claims does not categorically prohibit equitable tolling. Consider employment-discrimination claims under Title VII. Before a victim of employment discrimination can sue his employer under Title VII, he first must submit an administrative charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the date on which the alleged discrimination occurred. 42 U.S.C. § 2000e-5(e). This gives the EEOC the opportunity to attempt to mediate the dispute and convince the parties to settle. The EEOC is just one agency. And it processes nearly 100,000 charges per year. EEOC, *Charge Statistics FY 1997 Through FY 2013*, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited May 7, 2014). Yet, in *Zipes*, 455 U.S. at 393, this Court held that equitable tolling applies

to Title VII's time limit on submitting an administrative charge. FTCA claims, by contrast, number around 30,000 per year.[6] And they are spread across a variety of federal agencies (namely, the agencies responsible for the tortious conduct that injured the victims) for resolution.

This is not even in the same universe as *United States v. Brockamp*, 519 U.S. 347 (1997), where the Court recognized that permitting equitable tolling of the time limit for filing tax refunds would cause the whole system to grind to a halt. As the Court explained there, because "[t]he IRS processes more than 200 million tax returns each year[,] ... [t]o read an 'equitable tolling' exception into [the time limit] could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Id.* at 352. Accordingly, "allowing equitable tolling [does] not create an administrative nightmare for the FTCA regime, which encompasses far fewer claims than might be filed against the [IRS]." *Perez*, 167 F.3d at 917.

Finally, Petitioner is off-base to suggest that equity is banished from the FTCA's time limit for presenting administrative claims simply because the statute arises in actions against the United States.

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[6] This calculation comes from a leading treatise, which estimates the number of FTCA suits each year as about 1,500, and the number of administrative claims at 10 to 20 times that amount. Jayson & Longstreth, *supra*, at § 1.01.

This Court has made clear multiple times that time limits running against the government can be tolled under appropriate circumstances. *See, e.g.*, *Irwin*, 498 U.S. at 95-96; *Bowen*, 476 U.S. at 480; *Honda*, 386 U.S. at 500.

4. Petitioner tries to turn the rebuttable presumption in favor of tolling on its head by suggesting that because Congress could have enacted a "reasonable cause" exception and did not, equitable tolling should not be allowed. Pet. 17. But as this Court has repeatedly held, Congress enacts time limitations with the presumption that equitable tolling is allowed; Congress need not legislate it expressly. Thus, the failure to include such language is irrelevant. Further, "deductions from congressional inaction" regarding bills proposed years earlier "are notoriously unreliable" in discerning congressional intent. *Perez*, 167 F.3d at 917; *see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng' rs*, 531 U.S. 159, 170 (2001).

Moreover, it is notable that Congress elected to tie the two-year period not to a readily objectively identifiable event (as it did with respect to the six-month suit-filing period), but rather to the "accru[al]" of the claim, 28 U.S.C. § 2401(b), an event that courts must apply fact-intensive "equitable" principles to ascertain, *Santos*, 559 F.3d at 200 n.6. That choice shows that Congress expected the judiciary to play an active role in interpreting and policing the time limit for presenting administrative claims.

5. Finally, Petitioner's argument that recognizing equitable tolling would create an intractable "dilemma" that the agencies have no experience navigating (Pet. 15) is without merit. Given the uniform approach of the courts of appeals over at least the past 20 years recognizing equitable tolling, agencies for years have been navigating the precise "dilemma" that Petitioner suggests they are incapable of handling. Namely, when confronted with a claim they have found to be time-barred, they have been deciding whether to "deny the claim outright because it is time barred," *id.*, knowing that "a court [could] later f[i]nd equitable tolling appropriate and then proceed[] to the merits of the claim," Pet. 16, or to "conduct [their] own evaluation of possible tolling" and "evaluate the merits ... along with the tolling issue," Pet. 15-16, even though that arguably would "divert[] agency resources from the review of timely claims," Pet. 16. Moreover, agencies have been navigating essentially the same dilemma for even longer in the context of determining the antecedent question of when claims "accrue[]" within the meaning of section 2401(b).

If Petitioner believes that the current claim adjudication process is not optimal, it is free to ask Congress to amend the statute. Such concerns are not, however, grounds to ask this Court to disrupt the uniform view of the nine circuits that have decided the question presented that equity can toll the FTCA's time limit for presenting administrative claims.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REVIEWING THE QUESTION PRESENTED.

This Court "generally await[s] final judgment in the lower courts [*i.e.*, the end of the case] before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). The interlocutory character of a case "of itself alone furnishe[s] sufficient ground for the denial" of plenary review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Simply put, when "the Court of Appeals remand[s] the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *see Mt. Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting the denial of certiorari).

That is exactly what happened here. The decision of the court of appeals holding that, in certain circumstances, equity can toll the FTCA's time limit for presenting administrative claims remanded the case to the district court for further proceedings. Those proceedings could be many: (1) determining whether equitable tolling is warranted on the facts of this case, (2) adjudicating the government's challenge to jurisdiction on the grounds that the Federal-Aid Highway Act precludes a private cause of action (which neither the district court nor the court of appeals has evaluated so far), (3) discovery, (4) summary judgment, (5) pre-trial motions, (6) trial, and (7) post-trial motions. Developments at any one of

those stages could render this Court's intervention here unnecessary.

The interlocutory nature of the ruling here thus renders this case an inappropriate vehicle for addressing the question presented.

IV. THIS CASE SHOULD NOT BE CONSOLIDATED WITH *UNITED STATES V. WONG.*

The government has also filed a petition for certiorari asking the Court to review *United States v. Wong*, 732 F.3d 1030 (9th Cir. 2013) (en banc). According to that petition, *Wong* presents the question of "[w]hether the [FTCA's] six-month time bar for filing suit in federal court ... is subject to equitable tolling." Petition for a Writ of Certiorari at (I), *United States v. Wong* (2014) (No. 13-1074). "Because both time limits are codified in the same provision (28 U.S.C. 2401(b)), because there is substantial overlap in the arguments concerning equitable tolling, and because both questions are important, the United States recommends that the Court grant both petitions and consolidate the cases for briefing and argument." Pet. 6 n.2.

As this petition should be denied outright, there is no need to reach this issue. But consolidation would be inappropriate in any event. At the outset, Petitioner recognizes that the "overlap" is not so "substantial" that both cases must come out the same way. As the government has previously explained to this Court, "[a]lthough the FTCA's six-month limitations period and its two-year limita-

tions period are both contained in Section 2401(b), they are not identical." Brief for the Respondents in Opposition at 9, *Waltz v. United States*, 132 S. Ct. 107 (2011) (No. 10-1436). "In contrast" to the time limit on presenting administrative claims, "the six-month period is a *strict* limitation." *Id.* (emphasis added). Moreover, "[t]he six-month limitations period ... is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit," rendering the availability of equitable tolling less essential than in the context of the administrative claim-presentment period, which is triggered by a comparatively murky and fact-intensive "accru[al]" standard. *Id.* at 10. Accordingly, "even if the FTCA's two-year administrative filing deadline were subject to equitable tolling in certain circumstances, it would not follow that the six-month statutory time period for filing complaints in court would also be subject to equitable tolling." *Id.* As this opposition demonstrates, there are strong arguments in favor of equitable tolling of the time limit for presenting administrative claims—as evidenced by the uniform acceptance of such tolling by the courts of appeals—regardless of how this Court rules in *Wong*.

Petitioner has stressed these differences below, as well. It told the court of appeals that "[t]he different timing provisions were passed against different backgrounds and serve different functions." U.S. Ct. App. Supp. Br. 1-2. Moreover, "*Wong* did not address the historical, contextual, and structural features that are unique to the two-year time bar," which is important because the relevant "inquiries are highly contextual," *id.* at 6, and "the history and

context of that provision" are "distinct from the six-month filing deadline," *id.* at 8. Accordingly, it is no surprise that both Petitioner and June here make arguments that emphasize the unique nature of administrative review.

Given the distinct issues and contexts, consolidation would be improper.

CONCLUSION

This Court should deny the petition for a writ of certiorari. In any event, the Court should not consolidate this matter with *Wong*.

Respectfully submitted,

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May 7, 2014

REPLY BRIEF

Nos. 13-1074 and 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 13-1074

UNITED STATES OF AMERICA, PETITIONER

v.

KWAI FUN WONG

No. 13-1075

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In a one-two punch, the Ninth Circuit has overruled circuit precedent and held that both of the time bars in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), are nonjurisdictional limitations periods subject to equitable tolling. Those decisions are incorrect. The shifting treatment of the FTCA time bars within the Ninth Circuit and the fractured en banc decision in *Wong* v. *Beebe*, 732 F.3d 1030 (2013), exemplify the widespread confusion that has unfolded among and within the courts of appeals. This Court's

intervention would provide much needed clarity. Respondents' arguments to the contrary lack merit.

1. Respondents primarily contend (Wong Br. in Opp. 11-25; June Br. in Opp. 9-15) that this Court's review is not warranted because there is no circuit conflict on the questions presented. Respondents finely parse the courts of appeals' decisions and declare that the law is "settled" (Wong Br. in Opp. 15) and "uniform" (June Br. in Opp. 12). A fair reading of the numerous circuit decisions addressing the nature of the FTCA's time limits belies those assertions.

a. Respondents argue (Wong. Br. in Opp. 14; June Br. in Opp. 10-11) that at least seven courts of appeals now agree that the FTCA time limits are subject to equitable tolling. But respondents do not dispute that four of those courts have also held that the FTCA time limits are jurisdictional. See June Pet. 21. Those decisions squarely conflict with decisions of the Third, Seventh, and Ninth Circuits holding that the FTCA time limits are *not* jurisdictional. *Id.* at 20-21.

Respondents assert that the decisions are nevertheless "uniform" because the courts simply used "different legal reasoning to arrive at the same conclusion." Wong Br. in Opp. 15; see June Br. in Opp. 11-12. Respondents, however, do not dispute that this Court's recent case law renders any such "reasoning" fatally flawed. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (*Auburn Regional*) (if a time bar is "jurisdictional," there can "be no equitable tolling"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-134 (2008). Although Wong suggests (at 16-17) that this Court should wait and see how those four circuits choose to reconcile their irreconcil-

able holdings, the current state of the law presents a square conflict warranting the Court's review.

June attempts (at 11) to group the Fifth and Sixth Circuits with the others discussed above but, as explained in the certiorari petitions, cases in those circuits go both ways.[1] See June Pet. 22. Respondents' attempts to reconcile the competing case law within those circuits are unpersuasive. June contends (at 13-14) that *Perez* v. *United States*, 167 F.3d 913 (1999), provides the "governing rule" in the Fifth Circuit and that *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185 (2011), decided only "the antecedent issue" of when the claim accrued. But immediately after discussing accrual, the court "also" rejected the plaintiff's "equitable tolling" claim. *Id.* at 190-191. District courts in the Fifth Circuit thus describe circuit law as "unsettled." *Carter* v. *McHugh*, 869 F. Supp. 2d 784, 787-788 (W.D. Tex. 2012).

Respondents also contend (Wong Br. in Opp. 18-20; June Br. in Opp. 14-15) that *Glarner* v. *United States*, 30 F.3d 697 (1994), is controlling precedent in the Sixth Circuit. But just this month the Sixth Circuit again acknowledged, in what will be a published decision, that the questions "whether equitable tolling applies to the FTCA's limitations period" and whether "the time limitations in the FTCA are jurisdictional in nature" have "prompted some variance within this

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[1] June goes further still and suggests (at 11 n.4) that "even the circuits that have not formally reached the issue indicate that tolling is proper." But those courts simply assumed *arguendo* that equitable tolling may be available, while expressly noting that the issue remained open and undecided. See June Pet. 22. That does not constitute tacit approval.

circuit." *Jackson* v. *United States*, No. 13-1243, 2014 WL 1876240, at *6 & n.4 (May 12, 2014).

b. As the government explains in its petitions, the courts of appeals uniformly treated the FTCA time limits as jurisdictional for decades after the statute's enactment. See June Pet. 13 n.5, 20. June ignores those cases entirely.[2] Wong acknowledges them, but argues that the courts did not hold that "*because* the [S]ection 2401(b) limitations periods were jurisdictional, equitable tolling was not available." Br. in Opp. 21 (emphasis added). Even if that were true, it is not clear why the courts' failure to link the two principles has any bearing on the questions presented here.

Contrary to Wong's suggestion (at 21 n.15), the "jurisdictional" label was not merely descriptive; it had real consequences. For example, in *Schmidt* v. *United States*, 901 F.2d 680, 682 (8th Cir. 1990), vacated, 498 U.S. 1077 (1991), neither party could establish when the administrative notice denying plaintiffs' claim had been mailed. The court initially dismissed the FTCA claim because the plaintiffs had the "burden of establishing subject matter jurisdiction" and they failed to satisfy that burden. *Id.* at 683. When the panel later held that "the FTCA's statute of limitations is not jurisdictional," following this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), it reversed because the government now bore the burden of establishing the nonju-

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[2] June's congressional acquiescence argument (at 9, 12-13) cannot be squared with that case law. When Congress amended the FTCA's "presentment requirement" (*id.* at 12), the courts of appeals had consistently held that the time limits were jurisdictional. That Congress did nothing to alter that understanding cuts strongly against respondents' position.

risdictional limitations defense. *Schmidt* v. *United States*, 933 F.2d 639, 640 (8th Cir. 1991); see also, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988). Moreover, as Wong acknowledges (at 22 n.15), several courts of appeals *did* hold that equitable tolling of the FTCA time limits is unavailable. See also *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Houston* v. *USPS*, 823 F.2d 896, 902 (5th Cir. 1987), cert. denied, 485 U.S. 1006 (1988).[3]

Wong dismisses those cases (at 20-21) because they were decided before *Irwin*. But this Court's intervening decisions are a significant reason why the law remains unsettled. The Ninth Circuit provides a prime example. For decades after the FTCA's enactment, the Ninth Circuit characterized the FTCA time limits as "jurisdictional," attached jurisdictional consequences to untimely claims, and held that equitable tolling was not available. See, *e.g.*, *Hart* v. *United States*, 817 F.2d 78, 80 (1987); *Burns*, 764 F.2d at 724; *Mann* v. *United States*, 399 F.2d 672, 673 (1968). After *Irwin*, the Ninth Circuit changed course and held that equitable tolling was available for FTCA

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[3] Contrary to Wong's contention (at 22 n.15), neither the First nor the Fourth Circuit actually "permitted tolling." The discussions of government misconduct were relevant only to determining the appropriate accrual date. See *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248-250 (1st Cir. 1990); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 741-747 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991). And Wong's discussion of *Charlton* v. *United States*, 743 F.2d 557 (7th Cir. 1984), ignores the plaintiff's "first count"—which involved the six-month statutory deadline, not a regulation governing exhaustion, and which resulted in a dismissal "for lack of subject matter jurisdiction." *Id.* at 558-559.

claims. *Alvarez-Machain* v. *United States*, 107 F.3d 696, 701 (1996), cert. denied, 522 U.S. 814 (1997). Then, after *John R. Sand & Gravel*, the Ninth Circuit reverted to its initial assessment and held (again) that the FTCA time limits are jurisdictional and are not subject to equitable tolling. *Marley* v. *United States*, 567 F.3d 1030, 1032, 1034-1038, cert. denied, 558 U.S. 1076 (2009). Now, just a few years later, the Ninth Circuit has reversed course yet again and held that the time limits are not jurisdictional and that they are subject to equitable tolling. Wong Pet. App. 1a-102a; June Pet. App. 1a-2a; *Gallardo* v. *United States*, No. 12-55255, 2014 WL 1424469, at *4 (9th Cir. Apr. 15, 2014).[4]

c. The longstanding confusion among and within the courts of appeals cannot be dismissed as mere intracircuit conflicts. Wong Br. in Opp. 18; June Br. in Opp. 15. That seriously understates the duration and magnitude of the problem. As the sheer number of published appellate decisions cited in the petition-stage briefs highlight, these issues have arisen with remarkable frequency. And as courts continue to consider the issues or reconsider circuit precedent in light of whatever might be the Court's most recent decision on the general subject, the questions presented will continue to burden the judiciary and the United States. The Court should definitively resolve the question whether the time bars for tort claims against the United States under the FTCA are jurisdictional and not subject to equitable tolling, just as it did in *John R. Sand & Gravel* with respect to the

[4] Such shifting (and, at times, incompatible) jurisprudence is not unique to the Ninth Circuit. See, *e.g.*, *T.L.* v. *United States*, 443 F.3d 956, 959-961 (8th Cir. 2006).

other general category of monetary claims against the United States, *non*-tort claims under the Tucker Act.[5]

2. Wong contends (at 11-13, 25-28) that most of the courts of appeals' decisions involve the two-year deadline for filing an administrative claim, not the six-month court filing deadline; that the United States has distinguished the two FTCA time limits in prior filings; and that "[d]isputes about tolling of the six-month limitations period" are "extremely uncommon." Those arguments are unavailing and do not counsel against further review of the decision in *Wong*.

As an initial matter, there has been no "paucity of tolling disputes" (Wong Br. in Opp. 27) involving the six-month deadline. In the last two years alone, dozens of district courts have adjudicated requests to toll the FTCA's six-month time bar in decisions that (while often unpublished) are readily available on Westlaw.[6] And the Tenth Circuit is not the only court of appeals to have addressed the issue. *Id.* at 11-12, 26-27 (discussing *Benge* v. *United States*, 17 F.3d 1286

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[5] Another petition for a writ of certiorari raising the question of equitable tolling of the FTCA's two-year time bar is currently pending before the Court. See *Sanchez* v. *United States*, No. 13-1249 (filed Apr. 14, 2014).

[6] See, *e.g.*, *Alexander* v. *United States*, No. 14-cv-0137, 2014 WL 1871859, at *2 (S.D. Cal. May 5, 2014); *Abdelmoneim* v. *Department of the Army*, No. 12-cv-5268, 2014 WL 1277905, at *3 (E.D.N.Y. Mar. 27, 2014); *Hill* v. *United States*, No. 13-cv-307, 2014 WL 675498, at *1 (S.D. Ill. Feb. 21, 2014); *Reddick* v. *United States*, No. 13-cv-1027, 2014 WL 87903, at *2 (W.D. Ark. Jan. 9, 2014); *Hall* v. *United States*, No. 12-1387, 2013 WL 4047578, at *2 (D. Kan. Aug. 9, 2013); *Adderson* v. *United States*, No. 12-cv-395, 2013 WL 3717731, at *2 (N.D. Fla. July 16, 2013); *Toomey* v. *United States*, No. 12-111, 2013 WL 495470, at *2 (E.D. Ky. Feb. 8, 2013).

(10th Cir. 1994)). As Wong appears to recognize (at 12-13), the Ninth Circuit has confronted requests to equitably toll the six-month time bar at least three times over the last four years. See Wong Pet. App. 1a-102a; *Waltz* v. *United States*, 415 Fed. Appx. 782 (9th Cir.), cert. denied, 132 S. Ct. 107 (2011); *Marley*, *supra*. And at least seven other courts of appeals have considered similar claims over the last two decades.[7]

As Wong correctly notes (at 8-11, 12-13), the United States did argue against the Court's review in two earlier cases involving the FTCA's six-month court filing deadline. The government noted that there was "no direct conflict that warrants this Court's intervention" because (i) the conflicting cases did not involve the "six-month limitations period," and (ii) the Court had only recently decided *John R. Sand & Gravel* and most courts had not had the opportunity to consider that decision. Br. in Opp. at 8-10, *Marley*, *supra* (No. 09-270); see Br. in Opp. at 9-10, *Waltz*, *supra* (No. 10-1436). In the ensuing years, however, no court has seen fit to distinguish between the six-month and the two-year time limits in Section 2401(b), and the Ninth Circuit has now expressly rejected any such distinction. See June Pet. App. 1a-2a; *Gallardo*,

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[7] See, *e.g.*, *de Casenave* v. *United States*, 991 F.2d 11, 12-14 (1st Cir. 1993); *Goldblatt* v. *National Credit Union Admin.*, 502 Fed. Appx. 53, 55-56 (2d Cir. 2012); *Wilson* v. *United States Penitentiary Leavenworth*, 450 Fed. Appx. 397, 399 (5th Cir. 2011) (per curiam); *Jackson*, 2014 WL 1876240, at *2, *5-*7 (6th Cir.); *Schmidt* v. *United States*, 994 F.2d 843, 843 (8th Cir. 1993) (per curiam), cert. denied, 510 U.S. 1071 (1994); *Hill* v. *United States*, 296 Fed. Appx. 921, 921 (11th Cir. 2008) (per curiam), cert. denied, 558 U.S. 874 (2009); *Thomas* v. *United States Parole Comm'n*, No. 03-5289, 2004 WL 758966, at *1 (D.C. Cir. Apr. 7, 2004) (per curiam).

2014 WL 1424469, at *4. Six years after this Court's decision in *John R. Sand & Gravel*, uncertainty remains. The Court now has the opportunity to resolve both questions and to bring much needed clarity to this area of the law.

3. The twin decisions of the Ninth Circuit holding that both of the FTCA time bars are nonjurisdictional limitations periods subject to equitable tolling are wrong. To the extent Wong addresses the merits at all (at 29-31), she focuses on the phrase "shall be forever barred" in isolation and ignores the historical and contextual significance of that specific language in statutes authorizing suits against the United States itself for money damages: "Section 2401(b) contains emphatic language ('shall be forever barred') that was patterned after the jurisdictional limitation on Tucker Act suits"—which this Court has consistently held to be jurisdictional in a line of cases beginning with *Kendall* v. *United States*, 107 U.S. 123 (1883), and reaffirmed in *John R. Sand & Gravel*—and that was "historically linked to the FTCA's jurisdiction-granting provision." Wong Pet. 17 (citations omitted).

June attempts a more extended defense of the decision below (at 16-28), but she too fails to acknowledge the weight of countervailing authorities. For example, June relies heavily on the presumption in favor of equitable tolling (arguing that the presumption is "even stronger" in the context of administrative filings than it is for "court action[s]"), *id.* at 9-10, 16-18, 27, without acknowledging this Court's recent decision in *Auburn Regional* rejecting that presumption, and equitable tolling, in the context of a filing with an administrative agency. See June Pet. 15. June then makes an argument concerning the text,

structure, and purposes of the two-year time limit for filing an administrative claim, Br. in Opp. 18-22, without appreciating the significance of the particular text Congress chose and without placing the text, structure, and purposes of the time bars in their proper statutory and historical contexts—which powerfully support their jurisdictional force. See June Pet. 7-13.

As for the close relationship between the FTCA and the Tucker Act, June dismisses *John R. Sand & Gravel* as "sui generis." Br. in Opp. 23. But that misses the fundamental point. Congress enacted and subsequently amended the FTCA time limits against the backdrop of this Court's precedents declaring the directly parallel Tucker Act time limit to be jurisdictional. And when June does turn to the statutory history, she does not dispute that the FTCA time limits *were* jurisdictional as enacted. Her only response is that the two-year deadline for filing an administrative claim did not exist at that time. *Id.* at 24-25. But the administrative claims-presentment and exhaustion requirements and accompanying two-year deadline were plugged into the FTCA's already existing framework, and indeed the claims-presentment and exhaustion requirements are treated as jurisdictional prerequisites to suit. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993); June Pet. 15-16. Understood in this broader context, Congress clearly intended to enact absolute, jurisdictional time bars for FTCA claims.[8]

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[8] June also contends that "Congress crafted the time limit on presenting administrative claims with equity in mind" (at 17-18), but the 1949 House Report on which she relies merely explains why Congress extended the suit-filing period from one year to two years—*i.e.*, because "the existing limitation of 1 year" was "not in

4. Finally, respondents both argue against consolidation. Wong Br. in Opp. 32-34; June Br. in Opp. 30-32. Respondents contend that the government's request for consolidation "is in some tension" with its "position in *Marley*," "*Waltz*" and *June*. Wong. Br. in Opp. 33; June Br. in Opp. 30-32. Not so. The government's primary argument then and now is that "both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature, and thus are not subject to equitable tolling." Br. in Opp. at 9, *Marley*, *supra* (No. 09-270); Br. in Opp. at 10, *Waltz*, *supra* (No. 10-1436). The government has suggested, in the alternative, certain distinctions between the FTCA's two time limits—but no court of appeals has adopted those distinctions and the Ninth Circuit in *June* (and in a later published decision) expressly rejected them. See p. 8, *supra*. To be sure, the parties here may seek to highlight those differences if the Court grants review. But, as the government's petitions demonstrate, the arguments substantially overlap. And the Court could accommodate any differences between respondents by allowing division of their argument time.

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consonance with the practice prevailing in analogous departments of the law." H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949). The Report says nothing about equitable tolling, let alone equitable tolling of the not-yet-enacted two-year mandatory administrative filing deadline.

* * * * *

For the foregoing reasons, and those stated in the petitions for a writ of certiorari, the petitions should be granted and the cases consolidated for briefing and argument.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MAY 2014

JOINT APPENDIX

No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: MAR. 7, 2014
CERTIORARI GRANTED: JUNE 30, 2014

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 11-17776

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA,
DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
5/7/12	11	Submitted (ECF) Opening brief for review. Submitted by Appellant Marlene June. Date of service: 05/07/2012. [8168051] (JPL)
5/7/12	12	Filed clerk order: The opening brief [11] submitted by Marlene June is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the

DATE	DOCKET NUMBER	PROCEEDINGS
		word processing application, not from PACER or Appellate ECF. [8168237] (GV)
		* * * * *
6/20/12	17	Submitted (ECF) Answering brief for review. Submitted by Appellee USA. Date of service: 06/20/2012. [8221208] (BPG)
6/20/12	18	Filed clerk order: The answering brief [17] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8221629] (GV)
		* * * * *
7/5/12	23	Submitted (ECF) Reply brief for review. Submitted by Appellant Marlene June. Date of service: 07/05/2012. [8237524] (JPL)
7/5/12	24	Filed clerk order: The reply brief [23] submitted by Marlene June is filed. Within 7 days of the filing of this order, filer is ordered to file 7

DATE	DOCKET NUMBER	PROCEEDINGS
		copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8237821] (LA)
		* * * * *
10/3/13	33	Filed clerk order (Deputy Clerk: SM): Oral argument scheduled for October 16, 2013, is VACATED. Submission of this appeal is deferred pending resolution of Wong v. Beebe, No. 10-36136 (en banc). [8807766] (SM)
10/15/13	34	Filed clerk order (Deputy Clerk: SM): Submission of this appeal was deferred pending resolution of Wong v. Beebe, No. 10-36136 (en banc). Wong was decided on October 8, 2013. Therefore, within fourteen (14) days of the date of this order, the parties will file simultaneous briefs addressing the effect, if any, of Wong on this appeal. The briefs shall be no longer than 15 pages or 7,000 words. [8821888] (SM)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
10/24/13	37	Filed order (SIDNEY R. THOMAS, M. MARGARET MCKEOWN and MARK W. BENNETT) The Court still wishes the views of the parties on the effect, if any, of Wong v. Beebe, No. 10-36136 (en banc) on this appeal, and is not inclined to defer submission pending the Solicitor General's decision as to whether to file a petition for a writ of certiorari in Wong. Therefore, the joint motion to stay the briefing schedule is DENIED. However, the Court will reset the briefing schedule. The simultaenous briefs are now due within fourteen (14) days of the date of this order. The briefs shall be no longer than 15 pages or 7,000 words. [8834738] (SM)
		* * * * *
11/7/13	40	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Marlene June. Date of service: 11/07/2013. [8854684]—[COURT UPDATE: Attached corrected brief. Resent NDA. 11/08/2013 by RY] (JPL)
11/7/13	41	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA. Date of service: 11/07/2013. [8855219] (ACJ)
11/8/13	42	Filed clerk order: The supplemental brief [41] submitted by USA

DATE	DOCKET NUMBER	PROCEEDINGS
		is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8856122] [8856122] (GV)
11/8/13	43	Filed clerk order: The supplemental brief [40] submitted by Marlene June is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8857103] (GV)
		* * * * *
12/24/13	48	FILED MEMORANDUM DISPOSITION (SIDNEY R. THOMAS, M. MARGARET MCKEOWN and MARK W. BENNETT) REVERSED AND REMANDED. FILED

DATE	DOCKET NUMBER	PROCEEDINGS
		AND ENTERED JUDGMENT. [8914831] (MM)
2/19/14	49	MANDATE ISSUED. (SRT, MMM and MWB) [8982723] (CW)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(Phoenix Division)

Civil Docket No.: 2:11-cv-00901-SPL

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED/ IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED ANTHONY EDWARD BOOTH, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/5/11	1	COMPLAINT. Filing fee received: $350.00, receipt number PHX 0970-5269629, filed by Marlene June (submitted by John Leader). (Attachments: # 1 Civil Cover Sheet) (REK) (Entered: 05/05/2011)
		* * * * *
7/11/11	10	* MOTION to Dismiss Case for Lack of Jurisdiction by United States of America. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5) (Harwood, Ann) *Entry modified from "motion to dis-

DATE	DOCKET NUMBER	PROCEEDINGS
		miss" on 7/11/2011 (ESL). (Entered: 07/11/2011)
		* * * * *
8/12/11	13	*MOTION to Amend/Correct 1 Complaint *(First)* against United States of America, filed by Marlene June. (Leader, John) *Entry modified from "amended complaint" on 8/15/2011. *Proposed document not attached (ESL). (Entered: 08/12/2011)
8/12/11	14	*ADDITIONAL ATTACHMENT TO MAIN DOCUMENT Proposed First Amended Complaint re 13 MOTION to Amend/Correct. Filed by Marlene June. (Leader, John) *Entry modified from "lodged proposed document" on 8/15/2011 (ESL). (Entered: 08/12/2011)
8/12/11	15	RESPONSE to Motion re 10 MOTION to Dismiss for Lack of Jurisdiction filed by Marlene June. (Leader, John) (Entered: 08/12/2011)
8/19/11	16	REPLY to Response to Motion re 10 MOTION to Dismiss for Lack of Jurisdiction filed by United States of America. (Harwood, Ann) (Entered: 08/19/2011)

DATE	DOCKET NUMBER	PROCEEDINGS
8/25/11	17	RESPONSE in Opposition re 13 MOTION to Amend/Correct filed by United States of America. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Exhibit 6, # 3 Exhibit Exhibit 7, # 4 Exhibit Exhibit 8, # 5 Exhibit Exhibit 9) (Harwood, Ann) (Entered: 08/25/2011)
9/1/11	18	REPLY to Response to Motion re 13 MOTION to Amend/Correct *Complaint* filed by Marlene June. (Leader, John) (Entered: 09/01/2011)
11/1/11	19	ORDER granting Defendant the United States of America's 10 Motion to Dismiss and dismissing Plaintiff Marlene June's claims with prejudice; denying Plaintiff Marlene June's 13 Motion for Leave to File First Amended Complaint. It is further ordered directing the Clerk of Court to enter judgment of dismissal with prejudice in this matter. Signed by Judge Susan R Bolton on 11/01/11. (ESL) (Entered: 11/01/2011)
11/1/11	20	CLERK'S JUDGMENT that pursuant to the Court's order filed November 1, 2011, judgment is entered in favor of defendant and against plain-

DATE	DOCKET NUMBER	PROCEEDINGS
		tiff. Plaintiff to take nothing, and complaint and action are dismissed with prejudice. (ESL) (Entered: 11/01/2011)
11/18/11	21	NOTICE OF APPEAL to 9th Circuit, as to 19 Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion to Amend/Correct, 20 Clerk's Judgment by Marlene June. Filing fee received: $ 455.00, receipt number 0970-6075023. (Leader, John) (Entered: 11/18/2011)

* * * * *

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

Case No.: CV2006-002287

MARY MORGAN, A SINGLE WOMAN; SHAHONDA BOOTH, A SINGLE WOMAN; NAISHA ELLIS, A MARRIED WOMAN; [redacted], A MINOR, BY AND THROUGH *IIIS NATURAL MOTHER*, MARLENE JUNE; AND [redacted], A MINOR, BY AND THROUGH HIS NATURAL MOTHER, SHARON ROSS, PLAINTIFFS

v.

STATE OF ARIZONA; LINCOLN SHERWOOD FENCE, L.L.L.P., AN ARIZONA LIMITED LIABILITY LIMITED PARTNERSHIP; JOHN DOES I-X; JANE DOES I-X BLACK AND WHITE CORPORATIONS I-X; ABC PARTNERSHIPS I-X, DEFENDANTS

DOCKET ENTRIES

Party Information

Party Name	Relationship	Sex	Attorney
Mary Morgan	Plaintiff	Female	John Leader
Shahonda Booth	Plaintiff	Female	Pro Per
Naisha Ellis	Plaintiff	Female	Pro Per
Marlene June	Plaintiff	Female	Pro Per
Sharon Ross	Plaintiff	Female	Pro Per
[redacted]	In The Matter Of (IMO)	Male	Pro Per
[redacted]	In The Matter Of (IMO)	Male	Pro Per

Party Name	Relationship	Sex	Attorney
Arizona State	Defendant		Thomas Toone
Lincoln Sherwood Fence LLLP	Defendant		DONALD WILSON
Cecilia Gregorio	Plaintiff	Female	Michael Napier

Case Documents

Filing Date	Description	Docket Date	Filing Party
5/21/09	ODI - Order of Dismissal	5/21/09	
NOTE:	ORDER FOR DISMISSAL WITH PREJUDICE		
5/18/09	SFD - Stipulation For Dismissal	5/18/09	
NOTE:	Stipulation for Dismissal With Prejudice		
4/14/08	078 - ME: Case On Inactive Calendar	4/14/08	
4/10/08	NOS - Notice Of Settlement	4/10/08	
NOTE:	Notice Of Settlement		
4/9/08	094 - MW: Oral Argument Set	4/9/08	
4/1/08	MOT - Motion	4/1/08	
NOTE:	Motion to Strike Portions of Plaintiffs Statement of Facts		
4/1/08	RES - Response	4/1/08	

Filing Date	Description	Docket Date	Filing Party
NOTE: RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT			
4/1/08	SOF - Statement of Facts	4/1/08	
NOTE: SEPARATE STATEMENT OF FACTS IN OPPOSITION TO SUMMARY JUDGMENT AND STATEMENT OF DISPUTED FACTS			
3/20/08	MOT - Motion	3/20/08	
NOTE: Motion to Extend the Filing Deadline for the States Response to Plaintiffs Partial Motion for Summary Judgment			
3/17/08	NSD - Notice of Service Re: 26.1 Disclosure		
NOTE: Notice of Service of Plaintiffs Final Expert Opinions			
3/13/08	NSD - Notice of Service Re: 26.1 Disclosure	3/13/08	
NOTE: Plaintiffs Notice of Service of 19th Supplemental Disclosure			
3/10/08	005 - ME: Hearing	3/10/08	
2/19/08	MSJ - Motion for Summary Judgment	2/19/08	
NOTE: Plaintiffs Motion for Partial Summary Judgment Re: (1) Necessity for Median Barriers and (2) Inapplicability of Former Median Barrier "Warrant"			

Filing Date	Description	Docket Date	Filing Party
2/19/08	SOF - Statement Of Facts	2/19/08	
NOTE: Plaintiffs Separate Statement of Facts Re: Motion for Partial Summary Judgment, Necessity for Median Barriers			
2/15/08	094 - ME: Oral Argument Set		
2/11/08	REL - Reply	2/11/08	
NOTE: Reply in Support of Motion to Strike Maurice Bronstad			
1/31/08	005 - ME: Hearing	1/31/08	
1/31/08	019 - ME: Ruling	1/31/08	
1/30/08	ODI - Order Of Dismissal	1/30/08	
NOTE: ORDER OF DISMISSAL WITH PREJUDICE			
1/29/08	019 - ME: Ruling	1/29/08	
1/29/08	NSD - Notice of Service Re: 26.1 Disclosure	1/29/08	
NOTE: Plaintiffs Notice of Service of 18th Supplemental Disclosure Statement			
1/29/08	OBJ - Objection/Opposition.	1/29/08	
NOTE: Plaintiffs Opposition, Motion to Strike Opinions of Maurice Bronstad			
1/22/08	OBJ - Objection/Opposition.	1/22/08	
NOTE: Opposition to Defendants Request to Take Fact Witness Depositions			

Filing Date	Description	Docket Date	Filing Party
1/18/08	SFD - Stipulation For Dismissal	1/18/08	
NOTE:	Stipulation of Dismissal with Prejudice		
1/14/08	ORD - Order	1/14/08	
NOTE:	ORDER		
1/14/08	ORD - Order	1/14/08	
NOTE:	ORDER SETTING ORAL ARGUMENT		
1/8/08	MOT - Motion	1/8/08	
NOTE:	Motion to Strike Plaintiffs Engineering Design Expert Maurice Bronstad		
1/7/08	RES - Response	1/7/08	
NOTE:	Response to Plaintiff Morgans Motion to Suppress Pursuant to Rule 32(d)(4)		
1/3/08	MOT - Motion	1/3/08	
NOTE:	Unopposed Motion to Extend the Fact Witness Discovery and Final Expert Opinion Disclosure Deadlines		
1/3/08	MOT - Motion	1/3/08	
NOTE:	Motion for Leave to Take Fact Witness Depositions		
1/3/08	REQ - Request	1/3/08	
NOTE:	Request to Expedite Oral Argument on States Motion for leave to Take Depositions		
1/3/08	NOS - Notice Of Settlement	1/3/08	
NOTE:	Notice of Settlement		

Filing Date	Description	Docket Date	Filing Party
12/26/07	MOT - Motion	12/26/07	
NOTE: Supplement to Plaintiffs Motion to Suppress Improper Deposition Corrections			
12/19/08	REL - Reply	12/20/07	
NOTE: Reply in Support of Defendant State of Arizonas Motion to Dismiss			
12/14/07	MOT - Motion	12/17/07	
NOTE: Motion to Suppress Pursuant to Rule 32(d)(4)			
12/7/07	OBJ - Objection/Opposition.	12/7/07	
NOTE: Plaintiffs Opposition, Defendants Motion to Dismiss/For Summary Judgment			
12/7/07	SOF - Statement Of Facts	12/7/07	
NOTE: Plaintiffs Statement of Facts in Opposition to Defendants Motion to Dismiss/for Summary Judgment			
12/6/07	NSD - Notice of Service Re: 26.1 Disclosure	12/6/07	
NOTE: Plaintiffs Notice of Service of 17th Supplemental Disclosure Statement			
12/6/07	NSD - Notice of Service Re: 26.1 Disclosure	12/6/07	
NOTE: PLAINTIFFS NOTICE OF SERVICE OF AMENDED 1ST SUPPLEMENTAL DISCLOSURE STATEMENT			
12/4/07	NSD - Notice of Service Re: 26.1 Disclosure	12/4/07	

Filing Date	Description	Docket Date	Filing Party
NOTE: Plaintiffs Notice of Service of 16th Supplemental Disclosure Statement			
11/28/07	SFC - Stipulation For Continuance	11/28/07	
NOTE: Stipulation to Extend Plaintiffs Response Deadline, Motion to Dismiss			
11/9/07	NSD - Notice of Service Re: 26.1 Disclosure	11/9/07	
NOTE: Plaintiffs Notice of Service of 15th Supplemental Disclosure Statement			
11/9/07	MTD - Motion to Dismiss	11/9/07	
NOTE: Motion to Dismiss the Morgan Plaintiffs			
10/26/07	005 - ME: Hearing	10/26/07	
10/24/07	ODI - Order Of Dismissal	11/5/07	
10/9/07	NSD - Notice of Service Re: 26.1 Disclosure	10/9/07	
NOTE: Plaintiffs Notice of Service of 13th Supplemental Disclosure Statement			
10/3/07	NSD - Notice of Service Re: 26.1 Disclosure	10/3/07	
NOTE: Plaintiffs Notice of Service of 12th Supplemental Disclosure Statement			
10/1/07	RES - Response	10/1/07	
NOTE: RESPONSE TO PLAINTIFFS' CROSS-MOTION TO SET SUPPLEMENTAL EXPERT OPINION DEADLINE			

Filing Date	Description	Docket Date	Filing Party
9/28/07	NSD - Notice of Service Re: 26.1 Disclosure	9/28/07	
NOTE: Plaintiffs Notice of Service of 11th Supplemental Disclosure Statement			
9/28/07	STP - Stipulation	9/28/07	
NOTE: Plaintiffs Consent to Partial Summary Judgment Re: Maintenance			
9/28/07	ORD - Order	10/1/07	
NOTE: ORDER AMENDING CAPTION			
9/19/07	094 - ME: Oral Argument Set	9/19/07	
9/19/07	STP - Stipulation	9/19/07	
NOTE: Stipulation to Amend Caption			
9/13/07	RQH - Request For Hearing	9/13/07	
NOTE: eFile Id 106845 - Plaintiffs Request for Oral Argument Re: Defendants Motion to Strike Opinions of Dr. Robert Bleyl and Re: Plaintiffs Motion to Set Supplemental Expert Opinion Deadline			
9/13/07	ODI - Order Of Dismissal	9/13/07	
NOTE: eFile Id 106873—ORDER FOR DISMISSAL WITH PREJUDICE OF DEFENDANT LINCOLN SHERWOOD FENCE			
9/11/07	005 - ME: Hearing	9/11/07	
9/11/07	REL - Reply	9/11/07	
NOTE: eFile Id 106540—Reply in Support of Motion to Strike Robert Bleyl			

Filing Date	Description	Docket Date	Filing Party
9/5/07	OBJ - Objection/Opposition	9/5/07	
NOTE: eFile Id 105388—Plaintiff Gregorios Joinder in Plaintiff Morgans Opposition to Defendants Motion to Strike Robert Bleyl			
8/30/07	OBJ - Objection/Opposition.	8/30/07	
NOTE: eFile Id 104493—Plaintiffs Opposition, Motion to Strike Opinions of Dr Robert Bleyl and Motion to Set Supplemental Expert Opinion Deadline			
8/17/07	OBJ - Objection/Opposition.	8/17/07	
NOTE: eFile Id 102495—Supplment Plaintiffs Opposition to Request for Protective Order			
8/16/07	SFD - Stipluation for Dismissal	8/16/07	
NOTE: eFile Id 102249—Stipulation for Dismissal With Prejudice of Defendant Lincoln Sherwood Fence			
8/13/07	MOT - Motion	8/13/07	
NOTE: eFile Id 101663—Motion to Strike Expert Robert Bleyl			
8/2/07	094 - ME: Oral Argument Set	8/2/07	
8/2/07	MSJ - Motion For Summary Judgment	8/2/07	
NOTE: eFile Id 100289 -- Defendant State of Arizonas Motion for Partial Summary Judgment			
8/2/07	SOF - Statement Of Facts	8/2/07	

Filing Date	Description	Docket Date	Filing Party
NOTE: eFile Id 100293—Statement of Facts in Support of Motion for Partial Summary Judgment			
7/17/07	029 - ME: Status Conference	7/17/07	
7/13/07	OBJ - Objection/Opposition.	7/13/07	
NOTE: eFile Id 94202 – Joinder in Plaintiff Morgans Opposition to Protective Order			
7/13/07	NOT - Notice	7/13/07	
NOTE: eFile Id 94332—Notice to the Court Re: Status Conference of July 13, 2007			
7/10/07	REL - Reply	7/10/07	
NOTE: eFile Id 93117—Reply in Support of Motion for Protective Order			
7/6/07	REQ - Request	7/6/07	
NOTE: eFile Id 92000—Request for Oral Argument Defendants Motion for Protective Order			
7/6/07	NSD - Notice of Service Re: 26.1 Disclosure	7/6/07	
NOTE: eFile Id 92043—Notice of Service of 8th Supplemental Disclosure Statement			
7/6/07	NSD - Notice of Service Re: 26.1 Disclosure	7/6/07	
NOTE: eFile Id 92044 – Notice of Service of 9th Supplemental Disclosure Statement			

Filing Date	Description	Docket Date	Filing Party
7/6/07	NSD - Notice of Service Re: 26.1 Disclosure	7/6/07	
NOTE: eFile Id 92045 -- Notice of Service of 10th Supplemental Disclosure Statement			
7/2/07	OBJ - Objection/Opposition.	7/2/07	
NOTE: eFile Id 90834 -- Supplement, Plaintiffs Opposition to Request for Protective Order			
6/27/07	OBJ - Objection/Opposition.	6/27/07	
NOTE: eFile Id 89662 -- Opposition to Request for Protective Order			
6/22/07	MOT - Motion	6/25/07	
NOTE: FOR PROTECTIVE ORDER			
6/20/07	MOT - Motion	6/20/07	
NOTE: eFile Id 87525 -- Motion for Protective Order			
6/14/07	NSD - Notice of Service Re: 26.1 Disclosure	6/14/07	
Note: eFile Id 86081 -- Plaintiffs Notice of Service of 7th Supplemental Disclosure Statement			
6/13/07	NSD - Notice of Service Re: 26.1 Disclosure	6/13/07	
NOTE: eFile Id 85602 -- Plaintiffs Notice of Service of 6th Supplemental Disclosure Statement			
4/10/07	530 - ME: Case Designated for Mandatory E-Filing	4/10/07	
4/6/07	OCW - Order for Withdrawal of Counsel	4/10/07	

Filing Date	Description	Docket Date	Filing Party
4/4/07	ODI - Order Of Dismissal	4/11/07	
NOTE: WITHOUT PREJUDICE			
4/3/07	SFD - Stipulation For Dismissal	4/5/07	
NOTE: CLAIMS FOR PRODUCTS LIABILITY AND PUNITIVE DAMAGES AS AGAINST THE STATE OF ARIZONA			
2/9/07	NOT - Notice	2/14/07	
NOTE: OF JOINDER IN PLAINTIFF GREGORIO'S DISCLOSURE OF EXPERT WITNESSES			
2/9/07	NSD - Notice of Service Re: 26.1 Disclosure	2/14/07	
NOTE: OF SERVICE OF PLAINTIFFS' JOINT EXPERT WITNESSES MORGAN PLAINTIFF'S FIRST SUPPLEMENTAL DISCLOSURE			
11/23/06	027 - ME: Pretrial Conference	11/23/06	
11/8/06	MEM - Memorandum	11/14/06	
NOTE: JOINT RULE 16 PRETRIAL CONFERENCE			
11/1/06	026 - ME: Pretrial Conference Set	11/1/06	
10/20/06	REQ - Request	10/22/06	
NOTE: FOR RULE 16 COMPREHENSIVE PRE-TRIAL CONFERENCE			

Filing Date	Description	Docket Date	Filing Party
10/19/06	REQ - Request	10/24/06	
NOTE: FOR RULE 16 COMPREHENSIVE PRE-TRIAL CONFERENCE			
9/29/06	053 - ME: Case Consolidation	9/29/06	
NOTE: CONSOLIDATE CV2006-002403 UNDER CV2006-002287			
9/27/06	ORD - Order	9/29/06	
9/22/06	ANS - Answer	9/25/06	
NOTE: AMENDED SEPARATE			
9/20/06	ORD - Order	9/27/06	
NOTE: TO AMEND ANSWER			
9/15/06	STP - Stipulation	9/22/06	
NOTE: TO AMEND ANSWER			
9/15/06	MOT - Motion	9/19/06	
NOTE: JOINDER IN DEFENDANT STATE OF ARIZONA'S/TO CONSOLIDATE			
9/13/06	MCD - Motion To Consolidate	9/15/06	
NOTE: DEFENDANT LINCOLN SHERWOOD FENCE LLLP'S JOINDER IN DEFENDANT STATE OF ARIZONA'S			
9/8/06	MCD - Motion To Consolidate	9/14/06	
NOTE: PLAINTIFFS' JOINDER IN DEFENDANT STATE OF ARIZONA'S			
8/29/06	MCD - Motion To Consolidate	8/31/06	

Filing Date	Description	Docket Date	Filing Party
7/26/06	311 - ME: 150 Day Minute Entry	7/26/06	
7/13/06	ANS - Answer	7/14/06	
NOTE:	PAID		
7/13/06	NJT - Not Demand For Jury Trials	7/19/06	
7/13/06	CCA - Cert Compulsory Arbitration	7/19/09	
7/13/06	NNF - Not Of Non-Parties At Fault	7/18/06	
NOTE:	FIRST		
6/26/06	ANS - Answer	6/28/06	
NOTE:	CO-CHG		
6/26/06	CCN - Cert Arbitration - Not Subject	6/29/06	
NOTE:	DEFENDANT STATE OF ARIZONA'S		
6/26/06	NJT - Not Demand For Jury Trials	6/29/06	
NOTE:	DEFENDANT STATE OF ARIZONA'S		
6/15/06	AFS - Affidavit Of Service	6/20/06	
NOTE:	LINCOL SHERWOOD FENCE LLP SERVED 06/14/2006		
6/6/06	AFS - Affidavit Of Service	6/7/06	
NOTE:	ARIZONA STATE SERVED 06/05/06		

Filing Date	Description	Docket Date	Filing Party
5/24/06	322 - ME: Notice Of Intent To Dismiss	5/24/06	
2/17/06	COM - Complaint	2/23/06	
2/17/06	CCN - Cert Arbitration - Not Subject	2/23/06	

Case Calendar

Date	Time	Event
11/20/06	16:00	Pre-Trial Conference
7/13/07	9:00	Status Conference
9/7/07	9:00	Oral Argument
10/24/07	8:45	Oral Argument
10/24/07	9:00	Status Conference
1/28/08	10:30	Oral Argument
1/29/08	15:30	Oral Argument
3/6/08	15:30	Oral Argument
5/23/08	9:00	Status Conference
6/2/08	13:30	Oral Argument

Judgments

There are no judgments on file

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF MARICOPA

Case No.: CV2006-002287

MARY MORGAN, SINGLE WOMAN; SHAHONDA BOOTH, A SINGLE WOMAN; NAISHA ELLIS, A MARRIED WOMAN; [redacted], A MINOR, BY AND THROUGH HIS NATURAL MOTHER, MARLENE JUNE; AND [redacted], A MINOR, BY AND THROUGH HIS NATURAL MOTHER, SHARON ROSS, PLAINTIFFS

v.

STATE OF ARIZONA; LINCOLN SHERWOOD FENCE, L.L.L.P., AN ARIZONA LIMITED LIABILITY LIMITED PARTNERSHIP; JOHN DOES I-X; JANE DOES I-X BLACK AND WHITE CORPORATIONS I-X; ABC PARTNERSHIPS I-X, DEFENDANTS

Feb. 17, 2006

COMPLAINT

The Plaintiffs, for their Complaint against the Defendants, allege as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Mary Morgan is the surviving natural parent of Anthony E. Booth. Plaintiffs Shahonda Booth, Naisha Ellis, [redacted], a minor, by and through

Marlene June, and [redacted], a minor, by and through Sharon Ross, are the biological children of Anthony E. Booth. Plaintiff Mary Morgan is a resident of Maricopa County, Arizona. Plaintiff Shahonda Booth is a resident of the State of Florida. Plaintiff Naisha Ellis is a [2] resident of the State of New Jersey. Plaintiff [redacted] is a resident of the State of Maryland. Plaintiff [redacted] is a resident of the State of New York.

2. Defendant State of Arizona is a governmental entity that acts through its agents and employees. John Hauskins, Allan Samuels, Robert Miller, Carrie Satterlee, Sam Maroutkhani, and Perry Powell at the relevant times alleged herein were engineers for the Arizona Department of Transportation, an agency of the Defendant State of Arizona. Randy Allenstein was the Manager for the Local Government Section of the Arizona Department of Transportation. Victor Mendez was the Director of the Arizona Department of Transportation) (hereinafter "Defendants")

3. Defendant Lincoln Sherwood Fence, L.L.L.P., (herein after 'Defendants') is a business organization, organized, licensed and operating under the laws of the State of Arizona. Plaintiffs are informed, believe, and allege that Defendant Lincoln Sherwood Fence, L.L.L.P. has been, at all times relevant to this Complaint, involved in the installation and/or maintenance of the tri-cable median barrier that is the subject of this litigation.

4. Fictitiously named Defendants, John and Jane Does I-X, Black and White Corporations I-X, and ABC Partnerships I-X, upon information and belief, are liable for the acts complained of herein, but whose true identi-

ties are unknown to the Plaintiffs. Plaintiffs request leave of the Court to amend their Complaint to insert the true names of the fictitiously named Defendants when said names are known to the Plaintiffs, and to allege specifically their claims against said Defendants.

5. All events complained of herein occurred within Maricopa County, State of Arizona. All conditions precedent have been met, including notice pursuant to A.R.S. § 12-23 821.01. The amount of damages and controversy exceeds the minimal jurisdictional amount required for an action to be filed with this Court.

6. Each of the above named parties and individuals acted as agents for all other Defendants, and at all times acted within the scope of their authority and agency. Each of the named Defendants by their actions ratified each act of the other Defendants.

7. At all times referred to herein, each of the named Defendants were acting within the course and scope of their employment and for the benefit of the Defendant State of Arizona. Defendant State of Arizona is vicariously liable for all acts and failure to act by each of the named individuals.

COUNT ONE
(Negligence)

8. On February 19, 2005, Anthony E. Booth was a passenger in a car being driven by Laquitha Griffen. They were traveling eastbound on Interstate 10 in the vicinity of mile post 138.9.

9. At the above mentioned time and place, the Defendants had designed, installed, maintained and/or

controlled Interstate 10 and the cable barrier within the median.

10. Defendant State of Arizona has a non-delegable duty to operate and maintain public roadways in a safe condition) including the duty to design, select, install and maintain the cable barrier to protect those using the highway.

11. At the above mentioned time and place, the Defendants negligently failed to make Interstate l0 reasonably safe for ordinary vehicular traffic by failing to use reasonable care in the design, construction, and maintenance of Interstate 10 including but not limited to, providing for an adequate median and median barrier.

12. The cable barrier created a dangerous condition which the Defendants knew or should have known was not designed, constructed or maintained in conformance with generally accepted standards.

13. The Defendants knew or should have known the cable barrier posed an unreasonable risk of serious injury and death.

14. The Defendants failed to give any warning to persons using the highway of the danger and failed to remedy the design and/or construction defect.

15. As a direct and proximate result of the Defendants' negligence, the vehicle driven by Laquitha Griffen was able to pass through the cable barrier, cross through the median, and collide with another vehicle, resulting in the deaths of Laquitha Griffen and her [4] passenger, Anthony E. Booth.

16. As a direct and proximate result of the Defendants' negligence the Plaintiffs have suffered a loss of love, affection, companionship, consortium, probable inheritance, the benefit of future earnings, and child support.

COUNT TWO
(Strict Product Liability)

17. Plaintiffs reallege the allegations set forth in Paragraphs 1-16.

18. Defendants were uniquely situated to appreciate and understand the dangers and/or dangerous propensities inherent in the application and use of cable barriers.

19. Defendants knew or should have known that cable barriers would be applied and utilized in highway medians throughout the State of Arizona.

20. Defendants have no reasonable basis to believe motorists using the highway would realize the dangerous condition or properties, particularly those inherent in the negligent design of said cable barrier.

21. Defendants knew the cable barrier was not only dangerous for its intended use, but was negligently constructed so that said barrier would not prevent a vehicle from passing through the median based upon the angle of impact and/or design of the vehicle.

22. Defendants used a cable barrier design that was vulnerable to failure for the very purpose intended for a cable barrier, to prevent vehicles from crossing through the median.

23. Defendants failed to provide any warnings as to the dangerous propensities and/or dangers inherent in the application and use of the cable barrier.

24. Defendants failed to use reasonable care to inform or warn the public of the dangerous condition of the cable barrier or of any facts which rendered the barrier likely to be dangerous.

25. Defendants were responsible for the design, construction, assembly and testing and maintenance of the cable barrier.

26. Anthony E. Booth, was a passenger in a vehicle using the highway in a reasonably foreseeable manner. Anthony E. Booth lost his life because the cable barrier failed to prevent the vehicle from passing through the median.

27. The defective characteristics of the cable barrier outweigh the benefits of its design as constructed.

28. The cable barrier did not perform as an ordinary motorist would expect when used in a reasonably foreseeable manner.

29. The cable barrier was in a defective condition, unreasonably dangerous when put to the use for which it had been designed and assembled by the Defendants. It was also defective and unreasonably dangerous because of the failure of said Defendants to provide a suitable warning of the dangers inherent in the anticipated use of said instrument.

30. As a direct and proximate result of the Defendants acts and omissions, Anthony E. Booth died and the Plaintiffs suffered the injuries described above.

31. Defendants are strictly liable in tort for placing a defective and unreasonably dangerous cable barrier on

Interstate 10, which proximately caused the afore-described death of Anthony E. Booth.

COUNT THREE
(Product Liability Negligence)

32. Plaintiffs reallege the allegations set forth in Paragraphs 1-31.

33. Defendants were negligent and careless in the design, inspection, assembly, installation and maintenance of the above-described cable barrier and in the failure to warn with respect to the dangerous condition created by the cable barrier.

34. As a direct and proximate result of such negligence and carelessness, Anthony E. Booth died and the Plaintiffs suffered the injuries described above.

35. The acts and omissions of the Defendants as alleged herein were reckless, indifferent, and demonstrated both an awareness of, and a conscious disregard of, a substantial and unjustifiable risk that significant harm or death would occur to motorists using the highway. Therefore, Plaintiffs are entitled to recover punitive damages.

WHEREFORE, Plaintiffs pray for damages against the Defendants jointly and severally as follows:

A. For compensatory damages due to the loss of love, affection, companionship, consortium, probable inheritance, the benefit of future earnings, and personal anguish in an amount to be determined by the trier of fact;

B. For punitive damages against Defendants.

C. For attorneys fees and costs; and

D. For such other relief as the Court may deem just and proper in the premises.

DATED this 17 day of Feb., 2006.

HEBERT SCHENK P.C.

By /s/ RICHARD M. GERRY
RICHARD M. GERRY
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Trial Lawyers

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MICHAEL S. REDHAIR, ESQ. **DAVID J. DWYER, ESQ.**

Nov. 7, 2006

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: ***Records Request, 49 C.F.R. § 9.13;*** *Genduso v. State of Arizona, Maricopa County Arizona case no. CV2005-000627*

Dear Mr. Ortez:

Pursuant to 49 C.F.R., Part 9 §§ 9.13, I write to respectfully request production of FHWA records that are very important to several cases pending in the state of Arizona.

As background, I sent Mr. Brett Gainer of your agency an e-mail on March 2, 2006, inquiring about a deposition of Jennifer Brown, a Phoenix FHWA employee. My e-mail was forwarded to you, and you left me a voicemail the afternoon of March 2nd, referring me to 49 C.F.R., Part 9.

As mentioned in my e-mail, I was an Assistant U.S. Attorney for nine (9) years before entering private practice. In the above captioned case, I represent the surviving family members of a woman killed in cross median accident on State Route 101, near Phoenix, Arizona.

Through this letter, I formally request three categories of documents. First, I request documents concerning the FHWA's position, in the mid-late 1999, concerning whether the 3-cable median barrier design proffered and later selected by the State of Arizona had been deemed in compliance with crash testing requirements of NCHRP Report 350 and whether it had been approved for use on the NHS.

Second, I request any documents dealing with whether the State of Arizona requested and or received any type of design exception for its cable barrier design.

Third, I request any documents in the FHWA's possession dealing with the State of Arizona's installation and use of Brifen Wire Rope Safety Fence.

49 C.F.R. § 9.13—Statement of Relevance

Pursuant to 49 C.F.R. §9.13, I include the following Statement "setting forth the relevance of the records to the proceeding". The proceeding for which I request these records is *Genduso v. State Arizona*, Maricopa County Arizona case no. CV2005-000627.

In August, 1999, the Arizona Department of Transportation (hereafter "ADOT") decided to install 3- strand cable median barriers on over 100 miles of NHS freeways surrounding the city of Phoenix. It selected a design discussed in the 1996 AASHTO Roadside Design Guide. Jennifer Brown of the FHWA was involved in this process.

The design at issue is a weak post median configuration 3-strand cable barrier. "Median" configuration, as you may know, refers to placing the top and bottom cables on one side of the posts and the middle cable on the

other. The design ADOT chose has the top cable at 33", the middle at 27" and the bottom at 21".

Although this design was discussed in the 1996 RDG, the design was not subjected to Report 350 crash testing prior to 1999. In fact, it is my understanding that to this day, this design has never passed Report 350 testing.

I am involved in several cases against the State of Arizona involving this 3-cable median barrier design. Two of these cases involve fatalities in which the cable barrier failed to prevent a vehicle from crossing into oncoming traffic.

In these cases, I allege that the State of Arizona should have arranged for crash NCHRP 350 crash testing of its cable median barrier, with cables at 33", 27" and 21". A key issue in these cases is whether the FHWA, as of late 1999, had deemed this design to be 350 compliant or approved its use on the NHS.

The FHWA Had Neither Deemed This Design 350 Compliant nor Approved its Use on the NHS as of 1999

The State of Arizona provided me with e-mails between ADOT and the FHWA. These e-mails provide insight about the FHWA's position in mid-late 1999 regarding the 3-cable median barrier design ADOT was contemplating.

In particular, there is a series of e-mails from September 21-22, 1999 involving several FHWA employees. Copies of these e-mails are **Attachment 1** hereto. On September 21, 1999, at 3:48 p.m., Jennifer Hoaas-Brown e-mailed Charlie McDevitt, inquiring about the status of cable barriers for median applications. According to this e-mail, Ms. Hoaas-Brown had called Mr. McDevitt a

month earlier regarding cable barriers. In this e-mail, Ms. Hoaas-Brown also asked who was doing crash testing of these systems. This e-mail was forwarded to two ADOT employees.

The following day, September 22, 1999, at 11:18 a.m., Nick Artimovich of the FHWA sent the following e-mail to fellow FHWA employee Keith Harrison.

> Date: 09/22/1999 11:18 am -0400 (Wednesday)
>
> From: Nick Artimovich
>
> To: Harrison, Keith
>
> CC: "TOtterness@dot.state.az.us".gwhub.hubsmtp: Brown, Jennifer Hoaas; McDevitt, Charlie; Powers, Richard; Taylor, Harry; Umbs, Rudolph; Vachon, William
>
> Subject: Re: Cable Barriers for Median Applications
>
> Keith:
>
> Cable MEDIAN barrier has not been tested to 350. ROADSIDE cable barrier has, and it worked fine. The question is; does the median version perform satisfactorily with the pick-up truck, seeing as half of the real-world crashes will happen on the side that only has one cable bearing on the post? Dick Albin of Washington State DoT Said that they tested the median version with a small car, and it worked ok. There is no scheduled TL-3 test of the 2000P vehicle into the cable median barrier. (Various avenues are being explored to conduct that test, however.)

At last week's meeting of the AASHTO Task Force for Roadside Safety they made an absolute decision that the RDG would not include any hardware that had not been tested to Report 350 criteria by that time. Since the cable median barrier hasn't been tested it will be removed until proven 350-complaint (the new RDG will be in loose-leaf format so supplements can be issued.)

As far as I know, FHWA has no immediate intention of prohibiting the cable median barrier. We believe it will perform satisfactorily in service, and that it should also perform in an acceptable manner on the test track. We'll just wait for a crash test to prove it. All crash tested hardware will be on our web site: http://209.207.159.179/roadside/

Yes, we could be wrong, but if we withdraw it now and then say it's ok in 6 months, we'll look pretty wishy-washy.

I am cc'ing Dick Powers on this. He will be able to let you know just what to do with the states regarding non-tested hardware.

Regards,

Nick Artimovich

Office of Highway Safety Infrastructure

In this e-mail, Mr. Artimovich stated:

- cable median barrier has not been tested to 350
- roadside barrier [all three cables on same side of post] has, and it worked fine
- at a recent AASHTO Task Force for Roadside Safety meeting, AASHTO decided it would not

include any hardware that had not been 350 tested

- cable median barrier will be removed from the RDG because it hasn't been tested
- FHWA was waiting for a crash test to prove 350 compliance

Based on these e-mails, it appears that in late 1999, the FHWA did not believe ADOT's proposed design had been crash tested, nor had the Agency deemed ADOT's cable median barrier design to be 350 compliant or approved for use on the NHS. In fact, Mr. Artimovich informed ADOT that AASHTO was removing this design until it was tested to 350, and that FHWA was waiting for ADOT to do a crash test. Ms. Brown's September 21st e-mail also discusses AASHTO removing this design from the RDG.

Two significant FHWA Memoranda, dated August 28, 1998 and February 14, 2000, confirm the FHWA's position as of late 1999. Copies of these memos are attached, and both confirm that the design at issue, as of mid-late 1999, had not been deemed 350, compliant and/or approved for use on the NHS. See **Attachment 2** (8/28/98 memo) and **Attachment 3** (2/14/00 Memo).

The August 28, 1998 FHWA Memo

I recently completed a wrongful death trial in *DeVries v. State*, involving this 3-cable median barrier design. One of my trial witnesses was Douglas Head, a long time FHWA employee who retired in 1999. Mr. Head retired as the District Engineer for the FHWA Indiana Division.

Mr. Head worked extensively during his career with state highway department officials. Mr. Head testified

that pursuant to the August 28, 1998 Memo, the FHWA required any future hardware installed on the NHS to be 350 compliant. Mr. Head testified that as of late 1999, the FHWA had not deemed the ADOT design to be 350 compliant nor had this design been approved for use on the NHS.

The February 14, 2000 Memo

The stated purpose of the February 14, 2000 memo from Dwight Horne was to summarize the nonproprietary longitudinal barriers had either met 350 crash test standards or been deemed in compliance with Report 350:

Consequently, this memorandum summarizes and describes all nonproprietary longitudinal roadside and median barriers that have met Report 350 requirements at one or more test levels or are considered equivalent to bafflers that have been so tested. Where applicable, the reference

This Memo does not reflect that *any* cable median barrier designs had been deemed in compliance with Report 350. Again, a median configuration barrier places cables on both sides of the posts. As reflected in Nick Artimovich's Sept. 22, 1999 e-mail, this configuration had not been crash tested and its performance were not known.

In fact, the only cable barriers listed in the February 14, 2000 Memo as 350 compliant are two roadside cable guardrails ("roadside" barriers):

Test Level 3 (TL-3) Roadside and Median Barriers

Weak-Steel Post Cable (3-Strand) Guardrail (SGR01a-b)

Weak-Post Box-beam Guardrail and Median Barrier (SGR03 and SGM03)

"SGR01a-b" refers to the number AASHTO had assigned to these designs. I am attaching Appendix "B" to the 1996 RDG, which identifies designs "SGR01a" and "SGR01-b". Both are "roadside" barriers, and the top cables for both are at 30", not 33", the top cable height for ADOT's design. See **Attachment 4.**

In summary, from the limited number of documents I've reviewed, it is my understanding that as of mid-late 1999, the FHWA (1) had not deemed ADOT's proposed design to be 350 compliant or approved for use on the NHS; (2) had informed ADOT that AASHTO was removing this design from the RDG, and; (3) had encouraged ADOT to do crash testing.

The State of Arizona: "The FHWA deemed this design 350 compliant in July 1998"

To my surprise, and contrary to the documents previously discussed herein, the State of Arizona has taken the position in litigation that as of July, 1998, the FHWA had endorsed ADOT's proposed design and deemed it Report 350 compliant and, presumably, approved it for use on the NHS.

As an Assistant U.S. Attorney, I worked with many federal agencies. In my experience, these agencies are concerned when a state agency misrepresents the Federal Agency position in litigation on an important issue. I believe that has happened here.

I recently finished a two-week wrongful death trial against the State of Arizona in *DeVries v. State*. In that case, the State called Dr. Dean Sicking from the University of Nebraska to testify. Dr. Sicking testified that as of July 1, 1998, the FHWA *had deemed* ADOT's proposed median cable barrier design (top cable at 33", with 6" spacings between cables) to be 350 compliant. I believe this testimony had a significant impact on the jury, which returned a verdict in the State's favor. I also believe, as described above, that Dr. Sicking mis-stated the FHWA position as of late 1999.

I deposed Dr. Sicking in Houston, Texas on April 17, 2006. I am attaching pages 29-32 of that testimony, where he testified that in July, 1998, AASHTO and the FHWA agreed that all cable "median" barriers were deemed 350 compliant, and, presumably, approved for use on the NHS. See **Attachment #5.** He gave the same testimony at trial.

In support of this testimony, Dr. Sicking produced a document he claimed reflected the agreement reached between AAHSTO and FHWA. I attach it hereto, as **Attachment #6.**

Douglas Head testified—correctly, I believe—that the document Dr. Sicking relied upon was simply a proposed agreement that was never adopted. Mr. Head testified that the agreement actually reached between FHWA and AASHTO is reflected in the August 28, 1998: that the FHWA had not deemed any cable median barriers to be 350 compliant.

In the *DeVries* case, the decedent's vehicle impacted the 2-cable side of ADOT's 3-cable median barrier at

approximately 40-45 m.p.h., which is well below NCHRP 350's TL-3 test speed of 62 m.p.h.. The impact angle was approximately 20 degrees—well within Report 350's testing parameters. The vehicle was in a slow yaw.

The decedent was driving a convertible and the cables ripped the soft top from its mountings. One of the cables then entered the passenger compartment and pinned the decedent by the neck against his seat back. He died of asphyxiation.

Mr. Head explained to the jury that when the decedent's vehicle impacted the posts, the middle cable was knocked to the ground. It is known from the State of Washington's 1996 small car test that the posts can knock the off side cable(s) to the ground. The middle cable was thus disengaged.

Mr. Head further explained that the top cable, at 33", was too high to grab the decedent's vehicle. Cable marks along the top of the vehicle frame show where the top cable contacted but failed to "grab" the vehicle. Thus, Mr. Head testified that because the middle cable was knocked down and because the top cable was too high, there was only one (1) cable working to redirect the decedent's vehicle.

The foreslope of the median approaching the barrier by design was 8:1. The barrier's one cable mounted at the base of a slope was not able to safely re- direct the decedent's vehicle.

In summary, the State of Arizona has represented in litigation that the FHWA, in July 1998, deemed ADOT's proposed 3-cable median barrier to be Report 350 compliant and, presumably, approved for use on the NHS.

Brifen Wire Rope Safety Fence

In 2003, the State of Arizona approved the Brifen Wire Rope Safety Fence for use in Arizona. Since that time, no further installations of the 33" non-proprietary 3-cable system have occurred, and at least one segment of this 3-cable barrier has been replaced with Brifen barrier.

In April, 2005, Exponent, Inc. conducted a study regarding the effectiveness of Arizona's 3-cable barrier. It concluded that the 3-cable 33" system prevents only about 50% of cross-over crashes. See **Attachment #7.** The State of Arizona regularly employs Exponent on a variety of projects.

Despite the substandard performance of its 3-cable barrier, ADOT witnesses have testified under oath that the switch to Brifen was made purely for maintenance reasons.

I am requesting any documents in the FHWA's possession dealing with the State of Arizona's installation and use of Brifen Wire Rope Safety Fence.

Conclusion

It is my understanding that as of 1999, the FHWA had not deemed ADOT's proposed cable median barrier design to be 350 compliant nor had the FHWA approved it for use on the NHS.

The State of Arizona, however, has presented evidence in litigation that FHWA had endorsed this design in 1998, deemed it 350 compliant and presumably approved it for use on the NHS.

I am requesting three categories of documents from the FHWA. First, I request documents discussing or bearing upon whether ADOT's proposed 3-cable median barrier design had been approved for use on the NHS or deemed to be 350 compliant, as of mid-late 1999. Second, I request documents touching upon whether ADOT requested and/or received any type of FHWA design exemption or exception regarding the design at issue. Third, I request documents dealing with the State of Arizona's installation and use of Brifen Wire Rope Safety Fence.

In my opinion, ADOT's untested 3-cable design continues to cause injury and death on Arizona highways. I have two, and possibly three additional serious injury or death cases involving this design. As long as these 3-cable barriers remain in place on Arizona highways, there is a high likelihood of further lawsuits.

Thank you for your time and attention on these important issues. Please contact me if you have any questions.

Very truly yours,

REDHAIR, LEADER & DWYER

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.
JPL/jpl

SUPERIOR COURT FOR THE STATE OF ARIZONA
MARICOPA COUNTY

No. CV2006-018897

MARK MELVIN, A SINGLE MAN, PLAINTIFF

v.

STATE OF ARIZONA, A BODY POLITIC; DMJM ARIZONA, AN ARIZONA CORPORATION, DEFENDANTS

Dec. 11, 2006

COMPLAINT

(Tort-Motor Vehicle, Negligence, Gross Negligence, Strict Product Liability)

(Assigned to the Hon.)

Plaintiff, for his complaint against Defendants, alleges as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. Plaintiff Mark Melvin is a resident of Maricopa County, State of Arizona.

2. Defendant State of Arizona (hereafter "State") is a body politic/public entity charged by law with the duty of designing, constructing and or main-

taining state highways in a reasonably safe condition.

3. DMJM Arizona (hereafter DMJM) is an Arizona corporation with its principal place of business in Maricopa County, Arizona.

4. Each Defendant caused events to occur in the State of Arizona out of which this claim for relief arises.

5. Each Defendant is liable for the wrongful conduct of its officers, employees, servants and agents, including but not limited to its independent contractors.

6. All statutory prerequisites to obtaining jurisdiction, pursuant to A.R.S. 12-821.01, have been met and the State has denied Plaintiff's claim. The jurisdictional minimum for filing this action is satisfied and venue in this Court is proper.

FACTUAL ALLEGATIONS

7. On December 21, 2005, Mark Melvin was the seat belted driver of a 2003 Acura, lawfully operating said vehicle on State Route 51, at or near Milepost 11.4.

8. State Route 51 is a highway for which the State has legal responsibility in all respects pertinent to this action.

9. Prior to December 21, 2005, Defendant State and Defendant DMJM determined, in part based on an adverse history of cross-median crashes, that the median on the 51 highway at milepost 11.4 and at other locations should be closed, that is,

that a barrier should be installed to prevent errant vehicles from crossing the median and entering oncoming traffic lanes.

10. That on December 21, 2005, a median barrier selected, designed, installed and/or maintained by the Defendants was in place on SR 51 at or near milepost 11.4.

11. That the Defendants negligently designed, selected, installed and or maintained the median barrier installed at milepost 11.4 and at other locations, and that said median barrier was provided for the purpose of preventing cross median crashes.

12. On December 21, 2005, despite the presence of the median barrier that was designed, installed and maintained by the Defendants to prevent cross median crashes, an errant northbound vehicle entered the highway median and crossed into southbound traffic lanes, colliding with the vehicle driven by Plaintiff, causing him serious injuries, and killing the driver of said errant vehicle, Joshua McKellip.

13. Based on numerous prior failures of the Defendants' median barrier installed on the 51 and other state highways in the Phoenix area, it was foreseeable to the Defendants that their median barrier would fail and allow an errant vehicle to cross into oncoming traffic and collide with Plaintiffs' vehicle.

14. That the median cable barrier failed to adequately protect Plaintiff, resulting in Plaintiff's injuries and Mr. McKillip's death:

15. Plaintiff suffered severe injuries.

COUNT ONE
(Negligent Design, State & DMJM)

16. Plaintiff realleges and incorporates by reference each of the allegations set forth in paragraphs 1-12 above, as if fully rewritten herein.

17. That the State had a non-delegable duty to comply with existing design standards with respect to the selection, design, testing, installation and maintenance of roadside safety features, including median barriers.

18. That the State employed Defendant DMJM to design the median barrier which failed to prevent the subject cross-median collision.

19. That Defendant DMJM had a duty of due care with respect to its median barrier design, including a duty to comply with existing design standards with respect to selection, design, testing, and installation.

20. That the State and DMJM failed to act with due care and failed to comply with generally accepted highway design standards in the selection and design of the median barrier installed at the location of the subject accident.

21. That as a direct result of said negligence, Plaintiff suffered severe and permanent physical, mental and financial injuries.

COUNT TWO

(Defendants State and DMJM: Negligent Failure to Test)

22. Plaintiff realleges and incorporates by reference each of the allegations set forth above, as if fully rewritten herein.

23. That the Defendants had a duty to select, design and install their median barrier reasonably.

24. That each Defendant had a duty to conduct proper testing, including crash testing and In Service Evaluation, to ensure that the median barrier selected would provide reasonable protection to the motoring public.

25. The each Defendant negligently breached its duty to adequately, reasonably and properly test the median barrier as part of the design and/or installation process.

26. That as a direct result of said negligence, Plaintiff suffered severe and permanent physical, mental and financial injuries.

COUNT THREE

(Defendants State and DMJM: Negligent Failure to Retrofit)

27. Plaintiff realleges and incorporates by reference each of the allegations set forth above, as if fully rewritten herein.

28. That in or around 2002, the American Association of State Highway Traffic Officials (AASHTO) withdrew the weak post 3-strand cable median barrier with cable heights of 33", 27" and 21", which the Defendants had selected as part of

their median barrier design, from the AASHTO Roadside Design Guide.

29. That in or around April, 2003, the Defendants made a conscious decision not to make any further installations of 3-cable median barriers with cable heights of 33", 27" and 21" on State highways.

30. That the Defendants were aware, as of mid 2003, that its 3-cable median barrier was not providing reasonable protection to motorists.

31. the Defendants had a duty to retrofit, replace and otherwise change the median barrier at the accident location so as to provide reasonable protection to the traveling public.

32. That beginning in mid 2003, up to and including the date of the subject accident and based upon known and documented unreasonable performance of the 3-strand cable median barriers in and around the City of Phoenix, the Defendants had a duty, prior to the subject accident, to retrofit, upgrade and or replace the 3-strand cable median barrier with a barrier that could reasonably be expected to provide adequate.

33. That the Defendants negligently failed to make any modifications, updates or improvements to or replacements of the median barrier prior to the subject accident.

34. That a properly selected, designed, tested and installed median barrier would have prevented the subject cross-median crash.

35. That as a direct result of said negligence, Plaintiff suffered severe and permanent physical, mental and financial injuries.

COUNT FOUR

(Defendant State: Negligent Maintenance)

36. Plaintiff realleges and incorporates by reference each of the allegations set forth above, as if fully rewritten herein.

37. That Defendant State of Arizona had a duty to maintain both the Highway 51 median and its median barrier reasonably an in accordance with generally accepted highway maintenance standards.

38. That Defendant State of Arizona negligently failed to maintain the Highway 51 median and or its median barrier.

39. That as a direct result of said negligence, Plaintiff suffered severe and permanent physical, mental and financial injuries.

COUNT FIVE

(Gross Negligence and Reckless and Willful Disregard for Human Life-Defendant State of Arizona and DMJM)

40. Plaintiff realleges and incorporates by reference each of the allegations set forth in paragraphs 1-39 above, as if fully rewritten herein.

41. The each Defendant acted with gross negligence with respect to the design, selection, installation, maintenance, and failure to retrofit as previously alleged herein.

42. Defendants willfully, recklessly and with gross negligence failed to take reasonable and proper action to provide safe highways with respect to the SR51 median barrier, subjecting travelers on the SR51 to a substantial, unjustified risk of injury and death.

43. As a direct and proximate result of Defendant State and Defendant ADOT's gross negligence and reckless and willful disregard for their safety, Plaintiff was severely and permanently injured, including but not limited to, sorrow, stress and mental suffering experienced and probably to be experienced in the future.

COUNT SIX
(Strict Products Liability)

44. Plaintiff incorporates by reference herein each allegation previously made.

45. Plaintiff is informed, believes, and alleges that at all times relevant, defendants State of Arizona and DMJM and each of them, manufactured, fabricated, designed, assembled, distributed, bought, sold, inspected, serviced, repaired, marketed, warranted, supplied, modified and/or otherwise provided a product, that is, a 3-cable median barrier, to the traveling public, including Plaintiff and Joshua McKellip.

46. Plaintiff is informed, believes and alleges that at all times herein mentioned, the subject 3-cable barrier was defective and unreasonably dangerous when provided by defendants, and each of them, and was of such a nature that the defects

would not be discovered in the normal course of inspection and operation and use of said barrier.

47. That on December 20, 2005, the subject barrier, was being used by the traveling public, Plaintiff and Joshua McKellip, in a reasonably foreseeable manner.

48. That on said date, Joshua McKellip lost control of his vehicle on SR 51 and collided with the Defendants' median barrier, and that said barrier failed to provide reasonable safety for both Mr. McKellip and Plaintiff, resulting in severe personal injuries to Plaintiff.

49. The Defendants, by and through their employees, agents and/or contractors, designed, installed, fabricated, manufactured, tested, assembled, inspected, distributed, marketed, sold, delivered and/or supplied the subject vehicle: a) in a defective, unsafe and unreasonably dangerous condition and with a reasonably foreseeable defects and in an uncrashworthy condition.

50. That the harmful characteristics of the 3-cable median barrier outweigh the benefits of its design under the "hindsight" test set forth in *Dart v. Wiebe Manufacturing, Inc.*, 147 Ariz. 242, 247 (1985).

51. That in this accident and numerous accidents prior to December 20, 2005, the 3-cable median barrier did not perform as safely as an ordinary consumer would expect when, as here, the barrier was used in a reasonably foreseeable manner.

52. As a direct and proximate result of the defective and unreasonably dangerous barrier provided by the Defendants, Plaintiff has suffered and will continue to suffer throughout his lifetime severe and permanent physical and mental injuries, pain, suffering, embarrassment, humiliation, anxiety, permanent disfigurement and disability, loss of income and permanent loss of earning capacity.

WHEREFORE, Plaintiff respectfully request that this Court grant him judgment against each Defendant for:

a. Compensatory damages in an amount to be determined by a jury at trial;

b. Costs incurred herein;

c. Such other relief as the Court deems appropriate.

DATED this 11th day of Dec., 2006.

JOHN P. LEADER, ESQ.

/s/ JOHN P. LEADER
JOHN P. LEADER
Attorneys for Plaintiff

John P. Leader, P.C.
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Jan. 8, 2007

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: ***Records Request, 49 C.F.R. §9.13;*** *Genduso v. State of Arizona, Maricopa County Arizona case no. CV2005-000627*

Dear Mr. Ortez:

Thank you very much for the records provided December 21, 2006 by Vicki L. Tsutsumida, in response to my November 7, 2006 FOIA request.

I write to request two additional category of documents, pursuant to 49 C.F.R., Part 9 §§9.13: (1) those concerning the FHWA's position, as of July, 1998 regarding NCHRP 350 crash testing of roadside or median barriers, and (2) documents relating to agreements reached between the FHWA and AASHTO in 1998 regarding 350 testing of roadside and/or median barriers.

49 C.F.R. §9.13—Statement of Relevance

In August, 1999, the Arizona Department of Transportation (hereafter "ADOT") decided to install 3-strand cable median barriers on over 100 miles of NHS freeways

surrounding the city of Phoenix. It selected cable heights listed in the 1996 AASHTO Roadside Design Guide. Jennifer Brown of the FHWA was involved in this process.

The design at issue is a weak post median configuration 3-strand cable barrier. "Median" configuration, as you may know, refers to placing the top and bottom cables on one side of the posts and the middle cable on the other. The cable heights ADOT chose were 33", 27" and 21".

Although these cable heights were discussed in the 1996 RDG, the design was not subjected to Report 350 crash testing. It is my understanding that these cable heights have never passed Report 350 testing (although I am not completely sure of this).

I am involved in several cases against the State of Arizona involving its 3-cable median barrier design. Two of these cases involve fatalities in which the cable barrier failed to prevent a vehicle from crossing into oncoming traffic. A third case involves a man who driving a convertible and was strangled by one of the cables.

In these cases, I allege or may allege that the State of Arizona should have arranged for crash NCHRP 350 crash testing of its cable median barrier design.

As discussed in my November 7th letter, the State of Arizona called Dean Sicking was a witness in a recent cable barrier trial. Dr. Sicking testified that in July, 1998, AASHTO and the FHWA agreed that all cable "median" barriers were deemed 350 compliant, and, presumably, approved for use on the NHS. In other words, he testified that the FHWA agreed in July, 1998

that cable median barriers, including ADOT's design, did not need to be 350 crash tested. Dr. Sicking gave this same testimony at trial. Excerpts of Dr. Sicking's testimony were included as attachment #5 to my November 7th letter.

Dr. Sicking further testified that he advised ADOT its design did not need to be crash tested.

In support of this testimony, Dr. Sicking produced a document he claimed reflected the agreement reached between AAHSTO and FHWA. That document was included as **Attachment #6** to my November 7th letter.

I attached the following documents to my November 7th letter: (1) Nov. 22, 1999 e-mails exchange involving Nick Artimovich; (2) August 28, 1998 FHWA memorandum, and (3) February 14, 2000 FHWA memorandum. Based on these documents, it is evident that Dean Sicking's testimony is inaccurate and that he is wrong about the FHWA's position.

It is also evident that ADOT's 3-cable barrier performs poorly. Several of my consultants believe that 350 testing would have produced a barrier that performs far better and that many people whose families I represent would still be alive.

In summary, I have alleged that ADOT should have, but failed to 350 test its median barrier design. The State has responded—through Dean Sicking—that it did not have to crash test because the FHWA agreed in July 1998 that crash testing was not necessary.

I am considering adding Dr. Sicking as a defendant in one of my cases because he may well have been negligent for in advising ADOT that it didn't need to crash test its

barrier. His opinion that crash testing wasn't necessary was based on an alleged agreement between the FHWA and AASHTO—one I believe did not exist.

Requested Documents

Through this letter, I formally request documents concerning the FHWA's position, as of July, 1998 regarding NCHRP 350 crash testing of roadside or median barriers. Further, I request any documents relating to agreements reached (if any) between the FHWA and AASHTO in 1998 regarding 350 testing of roadside and/or median barriers. It is necessary for me to determine whether the FHWA in fact agreed in 1998 that cable median barriers did not need to be 350 crash tested.

Thank you again for your prompt response to my November 7th request, and I look forward to your response to the present request.

Very truly yours,

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.

JPL/jpl

John P. Leader, P.C.

[IMAGE OMITTED]

May 17, 2007

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: ***Testimony Request, 49 C.F.R. §9.15 for FHWA Employee JOHN R. BAXTER, P.E.***

Melvin v. State of Arizona, CV2006-018897, Morgan v. State of Arizona, CV2006-002287, DeVries v. State of Arizona, CV2003-022432

Dear Mr. Ortez:

I write pursuant to 49 C.F.R. §9.15, to request a deposition of FHWA employee John R. Baxter, P.E.. I seek Mr. Baxter's testimony on matters within his personal knowledge, arising out of his official duties, as set forth more fully below.

49 C.F.R. §9.15(a)(1)—Title of the case(s), docket number(s), and court, clear identification of the legal proceeding involved

Melvin v. State of Arizona, CV2006-018897, *Morgan v. State of Arizona*, CV2006-002287, *DeVries v. State of Arizona*, CV003-022432, are all filed in Maricopa County (Arizona) Superior Court. *Melvin* is a personal injury action, *Morgan* and *DeVries* are wrongful death cases.

49 C.F.R. §9.15(a)(2) A statement setting forth the basic facts in the proceeding, such as the type, date, and location of an accident;

Melvin involves a personal injury claim by my client, Mark Melvin, who received serious injuries December 20, 2005, when a ¼ ton pickup truck crossed the median at milepost 11.4 of State Route 51 near Phoenix and collided with his car. The driver of the pickup truck was killed.

The median barrier designed and installed by the Arizona Department of Transportation (ADOT) at the accident location failed to prevent this ¼ ton pickup from crossing the median.

Morgan is a wrongful death action in which I represent the surviving family members of Anthony Booth. On February 19, 2005, Mr. Booth was a passenger in a 2001 PT Cruiser traveling on I-10 in Phoenix. Near milepost 139, this vehicle left the roadway, entered the median and crossed into oncoming traffic. Mr. Booth and the driver (Laquitha Griffen) were killed. The driver of the other vehicle, Cecilia Gregorio, was seriously injured and she also brings a claim.

The median barrier designed and installed by ADOT failed to prevent this cross median crash. Accident reconstruction experts agree that the vehicle's center of gravity angle of approach was between 20 and 23 degrees, essentially within NCHRP 350 crash test standards, and that the impact speed into the barrier was also within Report 350's crash test standards.

It is my understanding that a primary reason ADOT went with a 33" top cable and 6" vertical spacings was to better protect against high profile vehicles like the *Melvin* ¼ ton pickup and the *Morgan* PT Cruiser crossing the median. The vertical height of a 2001 PT Cruiser (the *Morgan* vehicle) is 63". Cable markings on the roof

and "A" pillar indicate the vehicle passed under at least some of the barrier cables.

DeVries involves a gruesome accident in which 31-year old Lee Bryan DeVries, a former high school All-State football player, was nearly decapitated after colliding with ADOT's 3-cable median barrier on SR 101 in Scottsdale, Arizona. Mr. DeVries was driving a 2003 Honda S2000. According to witnesses and the accident report, Mr. DeVries was cut off by another vehicle and lost control of his vehicle (he had also been drinking).

After Mr. DeVries' vehicle struck the barrier, the cables ripped the convertible top off the car and one of the cables pinned Mr. DeVries by the neck against his seat back. He died of asphyxiation. This case is currently on appeal.

I was also counsel in *Genduso v. State of Arizona*, CV2005-000627. On January 15, 2004, Patricia Genduso was driving a 2000 Honda on SR 101 near Phoenix. Her vehicle left the roadway, entered the median, and crossed into oncoming traffic. Ms. Genduso was killed. The *Genduso* matter settled out of court.

In all four of these cases, the same 3-cable median barrier designed and installed by the State of Arizona was present in the median. The sole purpose of this device was to safely prevent vehicles from crossing into opposing traffic lanes. In *Melvin*, *Morgan* and *Genduso*, the barrier allowed an errant vehicle to cross the median, collide with oncoming traffic and killing one or more motorists. In *DeVries*, the barrier itself killed the driver.

49 C.F.R. §9.15(a)(3) A summary of the unresolved issues applicable to the testimony sought;

1. Whether Mr. Baxter's September 12, 2005 Memorandum Deems ADOT's 3-Cable Median Barrier Design to be NCHRP Report 350 TL-3 Crashworthy
2. Whether Mr. Baxter's September 12, 2005 Memorandum Authorizes Use of ADOT's 3-Cable Median Barrier Design on the NHS
3. Whether the February 14, 2000 Memorandum From Dwight Horne Erroneously Omits a Previously Approved Generic 3-cable design, as ADOT alleges

On September 12, 2005, FHWA employee John R. Baxter, P.E., signed an FHWA Memorandum with the following subject line:

Subject: INFORMATION: Generic Cable Barriers (Supplement to Acceptance Letter B-64)

From: /s/ JOHN R. BAXTER
JOHN R. BAXTER, P.E.
Acting Associate Administrator for Safety

A copy of this Memorandum is attached.

Mr. Baxter's memo resulted from numerous "after the fact" requests ADOT made for an FHWA endorsement of its generic 3-cable median barrier design. ADOT acknowledged at the *DeVries* trial that it solicited the FHWA's help because of lawsuits it was facing related to the cable median barrier design it knowingly chose not to test:

Q. Sir, one of the purposes of this letter was to avoid lawsuits, was it not?

A. Indirectly it was to put in—to certify that the design that had been put in the 1996 RDG and the one selected by ADOT was in compliance with the requirements of NCHRP 350 and to avoid claims that would come forth as a result of the system not being formally crash tested.

Q. So the answer is, yes, one of the reasons you wrote this letter was to avoid lawsuits, correct?

A. Indirectly, yes.

Q. And this letter was the beginning of a fairly lengthy back and forth with FHWA on this very issue, correct?

A. It took awhile, yes.

Q. It took awhile. In fact it took until September of 2005, correct?

A. That's when we got the final approval letter, yes.

Q. And I don't need to show you the document because I think you are familiar with it but the Baxter memo from September of 2005?

A. Yes.

(DeVries trial testimony of Terry Otterness, p. 32-33)

Mr. Baxter's Memorandum contains the following statement regarding ADOT's 3-cable design (beginning with "An earlier **cable median barrier** design . . . "):

> Note also that the 3-Strand **cable median barrier** shown in Figure C.1b in the 2002 AASHTO RDG) is

> classified as an NCHRP Report 350 TL-3 barrier. An earlier **cable median barrier** design, shown in Table C.1 in the 1996 edition of the RDG, has a greater separation between each cable which raises the top cable height to 33 inches while the bottom cable remains at a nominal 21-inch height. This design may also be considered acceptable as a TL-3 barrier.

It states that ADOT's design "may also be considered acceptable as a TL-3 barrier".

As referenced above, ADOT maintains through the testimony of Mr. Otterness that the FHWA has deemed the generic 3-cable design to be Report 350 TL-3 crashworthy.

Terry Otterness of ADOT also testified in *DeVries* that the FHWA has approved the generic 3-cable design for use on the NHS. He testified, at pages 33-34 of his *DeVries* cross examination:

> Q. Sir, that document doesn't say that the 33 inch design may be used on the NHS, does it?
>
> A. Well, my interpretation that's exactly what it says.
>
> Q. But the words aren't there, are they?
>
> A. Yes, they are.
>
> Q. The words aren't there as to the Arizona system, are they?
>
> A. In my opinion they certainly are.

At the *DeVries* trial, Dean Sicking discussed Mr. Baxter's Memorandum. As discussed more fully in my testimony request for Jennifer Hoass-Brown, Sicking testified that the FHWA deemed the generic 3-cable

design 350 compliant in 1998 (before ADOT chose the design).

There is a February 14, 2000 FHWA Memo authored by Dwight Horne that summarizes all nonproprietary barriers that had met 350's requirements as of February, 2000:

> Consequently, this memorandum summarizes and describes all nonproprietary longitudinal roadside and median barriers that have met Report 350 requirements at one or more test levels or are considered equivalent to barriers that have been so tested. Where applicable, the reference

ADOT's design, the generic 3-cable median barrier design, is not listed in this Memorandum as being 350 compliant.

To explain this, Dr. Sicking testified that the FHWA made a mistake in its February 14, 2000 Memorandum, and that it overlooked the prior 1998 approval of the generic 3-cable median barrier design. He testified, beginning at page 71:

> Q. Now let's go back to the text of Mr. Baxter's letter. Can we highlight that—the bottom that refers to the cable barrier, the bottom highlight? Yes. Thank you. Do you have that there on your monitor, Dr. Sicking?
>
> A. Yes I do.
>
> Q. The earlier cable median barrier design, let's read it together, shown in table C 1, that's the table C 1 that you were just questioned by Mr. Leader about, correct?

A. Correct.

Q. Out of the RDG?

A. Correct.

Q. Where there was some suggestion that there was some difference between the typical language and the diagram itself?

A. Correct.

Q. And that's in—Mr. Baxter says in the 1996 edition of the RDG so there is no question about which diagram he is talking about, is there?

A. No there is no question at all.

Q. Has a greater separation between each cable which raises the top cable to 33 inches while the bottom cable remains at a nominal 21 inch height. This design may also be considered acceptable as a test level three barrier.

There isn't any question that Mr. Baxter is certifying that the 33 inch diagram in C 1 is in fact certified as test level three compliant?

MR. LEADER: Objection, Judge. Based on the date of this memo I think it's beyond the scope of this witness's involvement.

THE COURT: Well, why don't you ask a question and let's hear the witness's answer. I will sustain the objection so but you can rephrase a question and I would like to hear what the witness has to say but go ahead.

Q. I think in questions put to you it was suggested that there was a conflict between the 2000 memo and the 1998 memo and the agreement that you participated in; do you recall that?

A. Yes.

Q. Is having looked at what's in evidence and that is Exhibit Number 37 and looking at the language that we just discussed is there any question in your mind that this confirms your recommendation and that in fact the Federal Highway Administration views this as test level three equipment?

A. No, there is no doubt in mind. This is basically supplement to the omission from the 2000 letter to correct that omission and bring it into conformance with the 1998 AASHTO FHWA agreement.

I do not believe that the FHWA deemed the generic 3-cable median barrier design TL-3 crashworthy in 1998, or at any time. Nor do I believe there is an error in the FHWA's February 14, 2000 Memorandum—the generic 3-cable median barrier design is not listed in that Memo as Report 350 approved because it hadn't been approved. There was no mistake by the FHWA, as Dr. Sicking alleges.

Paragraph 1 of Mr. Baxter's Memorandum states:

Mr. Dwight A Horne's February 14, 2002, memorandum, "Nonproprietary Guardrails and Median Barriers" (FHWA Acceptance Letter B-64), identified most of the commonly used non-proprietary roadside and median barriers that were considered to have met all NCHRP Report 350 test and evaluation criteria for their indicated test levels. Since its issuance, several inquiries have

been made concerning the status of specific cable barrier designs that were not listed in that memorandum. Please be advised that the following **roadside cable barrier** is considered to be crashworthy at TL-3 and may be used on the NHS:

Weak-Timber Post Cable Guardrail (AASHTO SGRO1c/ G1-c)

It states that the "Weak-Timber Post Cable Guardrail", specifically identified as a **"roadside cable barrier"**, "is considered to be crashworthy at TL-3 and *may be used on the NHS*. Based on this paragraph and other FHWA 350 approval letters I've seen, I believe this is the language used for devices deemed 350 compliant and approved for use on the NHS.

Mr. Baxter's Memo states that the generic 3-cable median barrier design "*may be considered acceptable* as a TL-3 barrier" and says nothing about approval for use on the NHS. In contrast, this Memo states that the roadside barrier "*is* considered to be crashworthy at TL-3", and, significantly, that is "may be used on the NHS".

49 C.F.R. §9.15(a)(4) A summary of the testimony sought and its relevance to the proceeding;

As discussed above, I would like to take Mr. Baxter's deposition regarding the meaning of his September 12, 2005 Memorandum, including:

(1) whether the FHWA has deemed ADOT's 3-cable design to be crashworthy at TL-3, and

(2) whether the FHWA has approved this design for use on the NHS

(3) whether the February 14, 2000 FHWA Memorandum mistakenly overlooks a prior TL-3 crashworthiness finding for the generic 3-cable design

49 C.F.R. §9.15(a)(5) A certification with support, that the information desired is not reasonably available from other sources, including Departmental documents;

As counsel of record in these cases, I certify by my signature below that, to the best of my knowledge, the information desired—Mr. Baxter's testimony—is not reasonably available from other sources, including Departmental documents.

49 C.F.R. §9.15(a)(6) Pursuant to § 9.9(d) of this part, an affidavit or certification describing the extent of a search of parties and potential parties and listing the names of the parties and potential parties notified

Section 9.9(d), Part 9, requires me, as the private litigant seeking this testimony, to ascertain, to the extent feasible, the identities of all parties, or potential parties, to those proceedings and notify them that a deposition has been granted and that they have the opportunity to participate.

If the requested deposition is granted, I will notify all parties in *Melvin*, *Morgan* and *DeVries*. The State of Arizona is a party (defendant) in all these cases. At present, the other known parties are:

Melvin: Defendant Daniel, Mann, Johnson and Mendenhall ("DMJM"), Inc.;

Morgan: Plaintiff Cecilia Gregorio and Defendant Lincoln Sherwood Fence Company, LLC

49 C.F.R. §9.15(a)(7) A declaration that the party will not seek expert or opinion testimony from the witness or seek the testimony of the witness at a hearing or trial in the proceeding.

I will not seek expert or opinion testimony from Mr. Baxter nor will I attempt to secure his personal appearance for testimony at trial.

49 C.F.R. §9.15(a)(7) The request shall specify which form of testimony (deposition, affidavit, declaration, or answers to interrogatories) is desired and the date by which it is desired

I request that Mr. Baxter be made available for deposition testimony on or before July 6, 2007, at a location chosen by the FHWA.

49 C.F.R. §9.15(b) The party seeking the testimony shall include with its request for testimony a copy of any prior request(s) made by the same requester to the Department or other agency of the United States for records pertaining to the matter being litigated and of the response (not including the records themselves) to the request(s).

In the *Melvin* and *Morgan* matters, I previously submitted a document request for: (1) documents or information in the FHWA's possession relating to all design features of the 3-cable median barriers used prior to August, 1999 in the states of Oregon and North Carolina, and; (2) documents or information in the FHWA's possession relating to performance of these barriers, before and/or after August, 1999, in the states of Oregon and North Carolina. Your agency thereafter complied with this request. Thank you.

In the *Genduso* matter, which is no longer pending, I submitted a document request November 7, 2006. Copies of these prior requests and your agency's responses are not attached, but are available upon request.

Thank you.

Very truly yours,
JOHN P. LEADER, P.C.

/s/ JOHN P. LEADER
John P. Leader, Esq.

JPL/jpl

John P. Leader, P.C.

[IMAGE OMITTED]

May 17, 2007

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: ***Testimony Request, 49 C.F.R. §9.15 for FHWA Employee JENNIFER HOASS-BROWN***

Melvin v. State of Arizona, CV2006-018897, Booth v. State of Arizona, CV 2006-002287, DeVries v. State of Arizona, CV2003-022432

Dear Mr. Ortez:

I write pursuant to 49 C.F.R. §9.15, to request a deposition of FHWA employee Jennifer Hoass-Brown. I am seeking Ms. Hoass-Brown's testimony on matters within her personal knowledge, arising out of her official duties, as set forth more fully below.

49 C.F.R. §9.15(a)(1)—Title of the case(s), docket number(s), and court, clear identification of the legal proceeding involved

Melvin v. State of Arizona, CV2006-018897, *Morgan v. State of Arizona*, CV 2006-002287, *DeVries v. State of Arizona*, CV2003-022432, are all filed in Maricopa County (Arizona) Superior Court, *Melvin* is a personal injury action, *Morgan* and *DeVries* are wrongful death cases.

49 C.F.R. §9.15(a)(2) A statement setting forth the basic facts in the proceeding, such as the type, date, and location of an accident;

Melvin involves a personal injury claim by my client, Mark Melvin, who received serious injuries December 20, 2005, when a ¼ ton pickup truck crossed the median at milepost 11.4 of State Route 51 near Phoenix and collided with his car. The driver of the pickup truck was killed.

The median barrier designed and installed by the Arizona Department of Transportation (ADOT) at the accident location failed to prevent this ¼ ton pickup from crossing the median.

Morgan is a wrongful death action in which I represent the surviving family members of Anthony Booth. On February 19, 2005, Mr. Booth was a passenger in a 2001 PT Cruiser traveling on I-10 in Phoenix. Near milepost 139, this vehicle left the roadway, entered the median and crossed into oncoming traffic. Mr. Booth and the driver (Laquitha Griffen) were killed. The driver of the other vehicle, Cecilia Gregorio, was seriously injured and she also brings a claim.

The median barrier designed and installed by ADOT failed to prevent this cross median crash. Accident reconstruction experts agree that the vehicle's center of gravity angle of approach was between 20 and 23 degrees, essentially within NCHRP 350 crash test standards, and that the impact speed into the barrier was also within Report 350's crash test standards.

It is my understanding that a primary reason ADOT went with a 33" top cable and 6" vertical spacings was to better protect against high profile vehicles like the *Melvin* ¼ ton pickup and the *Morgan* PT Cruiser crossing the median. The vertical height of a 2001 PT Cruiser (the *Morgan* vehicle) is 63". Cable markings on the roof

and "A" pillar indicate the vehicle passed under at least some of the barrier cables.

DeVries involves a gruesome accident in which 31-year old Lee Bryan DeVries, a former high school All-State football player, was nearly decapitated after colliding with ADOT's 3-cable median barrier on SR 101 in Scottsdale, Arizona. Mr. DeVries was driving a 2003 Honda S2000. According to witnesses and the accident report, Mr. DeVries was cut off by another vehicle and lost control of his vehicle (he had also been drinking).

After Mr. DeVries' vehicle struck the barrier, the cables ripped the convertible top off the car and one of the cables pinned Mr. DeVries by the neck against his seat back. He died of asphyxiation. This case is currently on appeal.

I was also counsel in *Genduso v. State of Arizona*, CV2005-000627. On January 15, 2004, Patricia Genduso was driving a 2000 Honda on SR 101 near Phoenix. Her vehicle left the roadway, entered the median, and crossed into oncoming traffic. Ms. Genduso was killed. The *Genduso* matter settled out of court.

In all four of these cases, the same 3-cable median barrier designed and installed by the State of Arizona was present in the median. The sole purpose of this device was to safely prevent vehicles from crossing into opposing traffic lanes. In *Melvin*, *Morgan* and *Genduso*, the barrier allowed an errant vehicle to cross the median, collide with oncoming traffic and killing one or more motorists. In *DeVries*, the barrier itself killed the driver.

49 C.F.R. §9.15(a)(3) A summary of the unresolved issues applicable to the testimony sought;

1. Whether a Median Barrier Was Warranted on SR 51, SR 101 and/or I-10

As you know, there have been many lawsuits involving ADOT's 3-cable barrier. As I understand it, one of ADOT's defenses is it should be excused for designing a sub-standard median barrier because median barriers were not "warranted" and were optional.

Ms. Hoass-Brown was involved in ADOT's 1997 decision to install median barriers on a small portion of SR 51, and ADOT's 1999 decision to install median barriers on a large scale, on SR 51, SR 101, SR 202, I-10 and I-17. Ms. Hoass-Brown was involved in the decision to install median barriers and would thus have personal knowledge about whether ADOT believed median barriers were "optional".

2. What Ms. Hoass-Brown communicated to ADOT in 1999 regarding Report 350 compliance of ADOT's proposed design 3-cable and/or approval for use of said design on the NHS

One of ADOT's primary defenses in *Morgan*, *Melvin* and *DeVries* is that the FHWA, as of 1999, had deemed its 3-cable design to be Report 350 complaint and approved for use on the NHS. I question the accuracy of this contention.

Ms. Hoass-Brown appears to have been ADOT's primary FHWA contact 1997-1999. I would like to know what she communicated to ADOT regarding whether ADOT's 3-cable median barrier design was NCHRP 350 complaint and/or approved for NHS use.

In *DeVries*, Dean Sicking, Ph.D., testified for ADOT. A copy of his trial testimony is attached as **Exhibit 1**. The State has also listed Dr. Sicking to give similar testimony in *Morgan* and *Melvin*.

As you probably know, the federal government officially adopted Report 350's testing requirements in 1993. See *Federal Register*, Vol. 58, No. 135, 7/18/93, pages 38293-38298, stating at page 38297 that:

> the FHWA (Federal Highway Administration) anticipates that approximately five years after adoption of this rule that all new installations of traffic barriers and other roadside safety features on NHS (National Highway System) projects will be only those judged to meet the testing and evaluation criteria in Report 350.

As you also probably know, five years later, in early 1998, an FHWA/AASHTO Report 350 Task Force was created to discuss the approaching deadline for Report 350 compliance.

Dr. Sicking, who was a consultant to this Task Force, has testified that in 1998, the FHWA deemed ADOT's 3-cable design (33" top cable, 6" vertical spacings) to be 350 complaint. At page 21 of his *DeVries* testimony, he testified regarding the discussions and conclusions of the 350 Task Force:

> A. Basically the discussion was centered upon my original draft of the document, of this document which said that three cable barrier had met 350. And the discussion was what did that mean. Did that mean that the three cable barrier in the roadside design guide at the time which was 1996

> roadside guideline had been approved as meeting 350 or was it limited to the Washington design which was the specific version of the three cable barrier that had been tested. And that discussion led to the conclusion that all of the designs in the 350—the RDG of 1996 were going to be approved as meeting 350.

Dr. Sicking relied upon a July 1, 1998 document titled: "AASHTO-FHWA Agreement Proposed By AASHTO 350 Task Force on NCHRP 350 Implementation." A copy was included as Attachment 6 to my November 7, 2006 FOIA Request submitted in the *Genduso* matter. It is attached here, as **Exhibit 2.**

Relying on this document, Dr. Sicking testified at page 42 that the FHWA approved this design for use on the NHS in 1998:

> A. Again, you know, this document says that the three cable median barrier is approved for use on the national highway system and so that's FHWA approval because it's an FHWA agreed to this document. And they described this cable barrier, three cable median barrier, the same way it's described in the industry for the roadside design guide designs. And so everyone reading this document was intended to believe that all of the systems in the Roadside Design Guide would meet 350 and were approved by FHWA as meeting 350 and that's what the intent of this document was. And so an explicit approval wasn't needed for this design.

As demonstrated by the above quoted testimony, Dr. Sicking testified that (1) the FHWA deemed ADOT's

3-cable median barrier design to be 350 compliant in 1998, and; (2) that FHWA approved this design for use on the NHS in 1998.

I would like to obtain Ms. Hoass-Brown's testimony on what she communicated to ADOT in 1999 on these points, that is, whether the FHWA had deemed ADOT's 3-cable median barrier design to be NCHRP 350 complaint and whether FHWA had approved it for use on the NHS.

3. Ms. Hoass-Brown's Knowledge Regarding the Relative Safety Performance of ADOT's 3-cable design and the Brifen Wire Rope Safety Fence

On October 3, 2006, ADOT Engineer Kenneth Cooper e-mailed Ms. Hoass-Brown a document titled "In Service Performance Evaluation, Brifen Wire Rope Safety Fence".

In this litigation, ADOT denies that the Brifen WRSF performs better than the challenged 3-cable design. Terry Otterness gave the following testimony at the *DeVries* trial on October 20, 2006, at page 36:

Q. Is it your testimony that the Brifen system doesn't perform any better than the three cable system?

A. We don't know at this point in time. There have been no studies that compare the tri cable system to the Brifen system.

Mr. Otterness gave this testimony October 20, 2006. On October 3, 2006, the Brifen In Service Evaluation was sent to Ms. Hoass-Brown, and this document demonstrates the superior performance of the Brifen system.

49 C.F.R. §9.15(a)(4) A summary of the testimony sought and its relevance to the proceeding;

As discussed above, I would like to obtain Ms. Hoass-Brown's testimony regarding:

(1) her involvement with ADOT's 1997 median barrier decisions and its 1999 median barrier decisions;

(2) what she communicated to ADOT in 1999 (and why) regarding the FHWA's position whether this design was 350 compliant, and

(3) what she communicated to ADOT in 1999 (and why) regarding use of this design on the NHS;

(4) Ms. Hoass-Brown's knowledge regarding the relative safety performance of ADOT's 3-cable design versus the Brifen Wire Rope Safety Fence

This testimony is relevant because of the defenses ADOT raises: (1) that median barriers were not required; (2) that the FHWA deemed ADOT's 3-cable median barrier design to be 350 compliant in 1998; (3) that in 1998, the FHWA approved ADOT's 3-cable median barrier for use on the NHS, and (4) ADOT claims that the relative safety performance of the 3-cable barrier versus Brifen is unknown.

49 C.F.R. §9.15(a)(5) A certification with support, that the information desired is not reasonably available from other sources, including Departmental documents;

As counsel of record in these cases, I certify by my signature below that the information desired—Ms. Hoass-Brown's testimony—is not reasonably available from other sources, including Departmental documents.

My November 7, 2006 FOIA request in the *Genduso* case requested FHWA documents "concerning the FHWA's position, in the mid-late 1999, concerning whether the 3-cable median barrier design proffered and later selected by the State of Arizona had been deemed in compliance with crash testing requirements of NCHRP Report 350 and whether it had been approved for use on the NHS". The FHWA did not produce any documents responsive to this request.

49 C.F.R. §9.15(a)(6) Pursuant to § 9.9(d) of this part, an affidavit or certification describing the extent of a search of parties and potential parties and listing the names of the parties and potential parties notified

Section 9.9(d), Part 9, requires me, as the private litigant seeking this testimony, to ascertain, to the extent feasible, the identities of all parties, or potential parties, to those proceedings and notify them that a deposition has been granted and that they have the opportunity to participate.

If the requested deposition is granted, I certify I will notify all parties in *Melvin*, *Morgan* and *DeVries*. The State of Arizona is a party (defendant) in all these cases. At present, here are the other known parties:

Melvin: Defendant Daniel, Mann, Johnson and Mendenhall ("DMJM"), Inc.;

Morgan: Plaintiff Cecilia Gregorio and Defendant Lincoln Sherwood Fence Company, LLC

49 C.F.R. §9.15(a)(7) A declaration that the party will not seek expert or opinion testimony from the witness or seek the testimony of the witness at a hearing or trial in the proceeding.

I will not seek expert or opinion testimony from Ms. Hoass-Brown nor will I attempt to secure her personal appearance for testimony at trial.

49 C.F.R. §9.15(a)(7) The request shall specify which form of testimony (deposition, affidavit, declaration, or answers to interrogatories) is desired and the date by which it is desired

I request that Ms. Hoass-Brown be made available for deposition testimony on or before July 6, 2007, in Phoenix, Arizona.

49 C.F.R. §9.15(b) The party seeking the testimony shall include with its request for testimony a copy of any prior request(s) made by the same requester to the Department or other agency of the United States for records pertaining to the matter being litigated and of the response (not including the records themselves) to the request(s).

In the *Melvin* and *Morgan* matters, I previously submitted a document request for: (1) documents or information in the FHWA's possession relating to all design features of the 3-cable median barriers used prior to August, 1999 in the states of Oregon and North Carolina, and; (2) documents or information in the FHWA's possession relating to performance of these barriers, before and/or after August, 1999, in the states of Oregon and North Carolina. Your agency thereafter complied with this request. Thank you.

In the *Genduso* matter, which is no longer pending, I submitted a document request November 7, 2006. Copies of these prior requests and your agency's responses are not attached, but are available upon request.

Thank you.

Very truly yours,
JOHN P. LEADER, P.C.

/s/ JOHN P. LEADER
John P. Leader, Esq.

JPL/jpl

John P. Leader, P.C.

[IMAGE OMITTED]

May 17, 2007

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: ***Testimony Request, 49 C.F.R. §9.15 for FHWA Employee ROBERT HOLLIS***

Melvin v. State of Arizona, CV2006-018897, Booth v. State of Arizona, CV 2006-002287, DeVries v. State of Arizona, CV2003-022432

Dear Mr. Ortez:

I write pursuant to 49 C.F.R. §9.15, to request a deposition of FHWA employee Robert Hollis. I seek Mr. Hollis' testimony on matters within his personal knowledge, arising out of his official duties, as set forth more fully below.

49 C.F.R. §9.15(a)(1)—Title of the case(s), docket number(s), and court, clear identification of the legal proceeding involved

Melvin v. State of Arizona, CV2006-018897, *Morgan v. State of Arizona*, CV 2006-002287, *DeVries v. State of Arizona*, CV2003-022432, are all filed in Maricopa County (Arizona) Superior Court. *Melvin* is a personal injury action, *Morgan* and *DeVries* are wrongful death cases.

49 C.F.R. §9.15(a)(2) A statement setting forth the basic facts in the proceeding, such as the type, date, and location of an accident;

Melvin involves a personal injury claim by my client, Mark Melvin, who received serious injuries December 20, 2005, when a ¼ ton pickup truck crossed the median at milepost 11.4 of State Route 51 near Phoenix and collided with his car. The driver of the pickup truck was killed.

The median barrier designed and installed by the Arizona Department of Transportation (ADOT) at the accident location failed to prevent this ¼ ton pickup from crossing the median.

Morgan is a wrongful death action in which I represent the surviving family members of Anthony Booth. On February 19, 2005, Mr. Booth was a passenger in a 2001 PT Cruiser traveling on I-10 in Phoenix. Near milepost 139, this vehicle left the roadway, entered the median and crossed into oncoming traffic. Mr. Booth and the driver (Laquitha Griffen) were killed. The driver of the other vehicle, Cecilia Gregorio, was seriously injured and she also brings a claim.

The median barrier designed and installed by ADOT failed to prevent this cross median crash. Accident reconstruction experts agree that the vehicle's center of gravity angle of approach was between 20 and 23 degrees, essentially within NCHRP 350 crash test standards, and that the impact speed into the barrier was also within Report 350's crash test standards.

It is my understanding that a primary reason ADOT went with a 33" top cable and 6" vertical spacings was to better protect against high profile vehicles like the *Melvin* ¼ ton pickup and the *Morgan* PT Cruiser crossing the median. The vertical height of a 2001 PT Cruiser (the *Morgan* vehicle) is 63". Cable markings on the roof

and "A" pillar indicate the vehicle passed under at least some of the barrier cables.

DeVries involves a gruesome accident in which 31-year old Lee Bryan DeVries, a former high school All-State football player, was nearly decapitated after colliding with ADOT's 3-cable median barrier on SR 101 in Scottsdale, Arizona. Mr. DeVries was driving a 2003 Honda S2000. According to witnesses and the accident report, Mr. DeVries was cut off by another vehicle and lost control of his vehicle (he had also been drinking).

After Mr. DeVries' vehicle struck the barrier, the cables ripped the convertible top off the car and one of the cables pinned Mr. DeVries by the neck against his seat back. He died of asphyxiation. This case is currently on appeal.

I was also counsel in *Genduso v. State of Arizona*, CV2005-000627. On January 15, 2004, Patricia Genduso was driving a 2000 Honda on SR 101 near Phoenix. Her vehicle left the roadway, entered the median, and crossed into oncoming traffic. Ms. Genduso was killed. The *Genduso* matter settled out of court.

In all four of these cases, the same 3-cable median barrier designed and installed by the State of Arizona was present in the median. The sole purpose of this device was to safely prevent vehicles from crossing into opposing traffic lanes. In *Melvin*, *Morgan* and *Genduso*, the barrier allowed an errant vehicle to cross the median, collide with oncoming traffic and killing one or more motorists. In *DeVries*, the barrier itself killed the driver.

49 C.F.R. §9.15(a)(3) A summary of the unresolved issues applicable to the testimony sought;

1. The Reasons for ADOT's April, 2003, Request for a "Public Interest" Finding Regarding Use of the Brifen Wire Rope Safety Fence (WRSF) and Why The FHWA Approved Found Use of the Brifen System to Be in the Public Interest

On April 28, 2003, ADOT Assistant State Engineer John L. Louis submitted the following written request to Mr. Hollis:

> Based upon the information herein provided, we request FHWA review and approval of the Brifen WRSF in the public interest as a sole source proprietary system . . .

The FHWA granted ADOT's request, and, since that time, no new cable median barrier installations have used the 3-cable design at issue in this litigation.

In the *DeVries* case, Mr. Terry Otterness testified that the primary reason ADOT switched to the Brifen system was "maintenance costs". He denied that ADOT had any concerns over the performance of the 3-cable design:

Q. Mr. Otterness, at the time you were contacted by Brifen in April or early 2003, did ADOT have any concerns that the median barrier that was in place was not performing as well as you would like?

MR. LaMAR: In what regard, Counsel?

Q. Do you understand the question, Mr. Otterness?

MR. LaMAR: Objection; form, foundation.

A. I do not believe we had any major concerns regarding performance.

Q. Did you have any minor concerns?

A. Nothing significant.

Q. Well, tell me—

A. The primary decision was based on maintenance costs.

Q. Tell me if you had any concerns at all, however insignificant, over the performance of the U.S. low-tension system that was in place.

A. What was that again?

MR. LEADER: Would you read the question back, please? The requested portion of the record was read by the reporter.)

A. No.

(Terry Otterness May 6, 2006 testimony, beginning at page 103, line 21).

At page 129, line 2 of this deposition, Mr. Otterness testified:

Q. All right. And as I understand it, it's your testimony under oath that the decision to opt for the Brifen system had nothing to do with performance concerns of the Brifen system as compared to the U.S. low-tension system?

A. I said that it had to do with—primarily with maintenance, and that was the primary issue that we were looking at, and that we hoped for higher performance with the system.

But there was nothing to—there was nothing that we had going on that made us feel that the existing system was inadequate from a performance point of view.

Beginning at page 69, line 14 of his trial testimony, Mr. Otterness gave similar testimony:

Q. And you have been deposed in this litigation and you explained to Mr. Leader why you chose to use the Brifen [sic] system in 2003, correct?

A. Yes.

Q. Tell the jury what advantages there are to the Brifen [sic] system and why you chose to use it on some of the projects in Arizona.

A. The Brifen system was presented to ADOT by the Brifen U. S. A. Corporation in 2003. We reviewed their proposal before a committee that accepts new products. And in evaluation of it we determined that there may be some advantages.

One of the things that we were looking for in another system was to have maintenance advantages. That it turned out that the maintenance of the three cable system was very costly and it was costing a lot more money than we initially thought it would. So we were looking for a system that was more maintenance friendly.

The design of the Brifen system also it's a prestretched cable system and by prestretching it at the plant it makes it stiffer. And in the crash test for the Brifen system, the deflection is less than it is for the three cable system. So the—since the

> deflection is less it offers some placement advantages because it doesn't deflect as far.
>
> As far as overall performance it was a brand new product. All we know is that it's 350 compliant the same as the cable barrier we were using is.
>
> The other advantage to the Brifen system was demonstrated during their presentation to ADOT was that when the system is hit it stays in place. On a normal hit where a vehicle might hit and knock down six or seven posts if you look at the three cable system it's laying on the ground.
>
> The Brifen system offers the advantage under a normal hit that the cables are still up in the air so that if another vehicle were to come along prior to the maintenance being done there is a chance it could be effective a second time.

In summary, the State of Arizona contends that it switched to the Brifen system for maintenance reasons and that it had no concerns over the safety performance of the 3-cable design.

Based on John Louis' April 28, 2003 letter, it is believed that Mr. Hollis has personal knowledge regarding why ADOT requested a Public Interest finding to use Brifen and why the FHWA made this Public Interest finding.

2. Whether the FHWA Could Have Made a "Public Interest" Finding in 1999 Allowing ADOT'S Use of the Brifen Wire Rope Safety Fence (WRSF) or Otherwise Allowed ADOT's Use of Brifen in 1999

The Brifen WRSF passed NCHRP 350 testing in May, 1999. Copies of the MIRA 350 test reports are attached. ADOT denies it could have used the Brifen system in 1999. Plaintiffs in *Melvin*, *Morgan* and *DeVries* believe that ADOT could and should have selected the 350 tested Brifen system in 1999.

Plaintiff wishes to question Mr. Hollis on this topic.

49 C.F.R. §9.15(a)(4) A summary of the testimony sought and its relevance to the proceeding;

As discussed above, I would like to obtain Mr. Hollis' testimony regarding:

(1) his understanding of why ADOT requested and why the FHWA approved ADOT's April, 2003, Request for a "Public Interest" Finding regarding use of the Brifen Wire Rope Safety Fence (WRSF)

(2) whether the FHWA could have made a "Public Interest" Finding regarding ADOT'S use of the Brifen Wire Rope Safety Fence (WRSF) or otherwise allowed ADOT's use of Brifen in 1999

This testimony is relevant because the Brifen system is superior to ADOT's 3-cable design. Had a Brifen barrier been available for any of these accidents, the resulting injuries and deaths probably would have been prevented.

49 C.F.R. §9.15(a)(5) A certification with support, that the information desired is not reasonably available from other sources, including Departmental documents;

As counsel of record in these cases, I certify by my signature below that, to the best of my knowledge, the

information desired—Mr. Hollis' testimony—is not reasonably available from other sources, including Departmental documents.

49 C.F.R. §9.15(a)(6) Pursuant to § 9.9(d) of this part, an affidavit or certification describing the extent of a search of parties and potential parties and listing the names of the parties and potential parties notified

Section 9.9(d), Part 9, requires me, as the private litigant seeking this testimony, to ascertain, to the extent feasible, the identities of all parties, or potential parties, to those proceedings and notify them that a deposition has been granted and that they have the opportunity to participate.

If the requested deposition is granted, I will notify all parties in *Melvin*, *Morgan* and *DeVries*. The State of Arizona is a party (defendant) in all these cases. At present, the other known parties are:

Melvin: Defendant Daniel, Mann, Johnson and Mendenhall ("DMJM"), Inc.;

Morgan: Plaintiff Cecilia Gregorio and Defendant Lincoln Sherwood Fence Company, LLC

49 C.F.R. §9.15(a)(7) A declaration that the party will not seek expert or opinion testimony from the witness or seek the testimony of the witness at a hearing or trial in the proceeding.

I will not seek expert or opinion testimony from Mr. Hollis nor will I attempt to secure his personal appearance for testimony at trial.

49 C.F.R. §9.15(a)(7) The request shall specify which form of testimony (deposition, affidavit, declaration, or

answers to interrogatories) is desired and the date by which it is desired

I request that Mr. Hollis be made available for deposition testimony on or before July 6, 2007, in Phoenix, Arizona.

49 C.F.R. §9.15(b) The party seeking the testimony shall include with its request for testimony a copy of any prior request(s) made by the same requester to the Department or other agency of the United States for records pertaining to the matter being litigated and of the response (not including the records themselves) to the request(s).

In the *Melvin* and *Morgan* matters, I previously submitted a document request for: (1) documents or information in the FHWA's possession relating to all design features of the 3-cable median barriers used prior to August, 1999 in the states of Oregon and North Carolina, and; (2) documents or information in the FHWA's possession relating to performance of these barriers, before and/or after August, 1999, in the states of Oregon and North Carolina. Your agency thereafter complied with this request. Thank you.

In the *Genduso* matter, which is no longer pending, I submitted a document request November 7, 2006. Copies of these prior requests and your agency's responses are not attached, but are available upon request.

Thank you.

Very truly yours,
JOHN P. LEADER, P.C.

/s/ JOHN P. LEADER
John P. Leader, Esq.

JPL/jpl

SEAL OMITTED]

U.S. Department of Justice
United States Attorney
District of Arizona

Two Renaissance Square
40 North Central, Suite 1200
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Oct. 30, 2007

Via U.S. Mail & Facsimile

John P. Leader, Esq.
Leader & Lautz, PC
1715 E. Skyline Dr., Suite #121
Tucson, AZ 85718
FAX: (520) 575-9340
Telephone: (520) 575-9040

Re: *State Court Subpoenas Decus Tecum to FHWA Employees*

Dear John:

Pursuant to our telephone conversation of yesterday, this letter is to confirm the intention of FHWA employees Hollis and Hoass-Brown to follow agency instructions under 49 C.F.R. Part 9 and decline to testify and produce agency records at their scheduled depositions on November 7, 2007. As indicated in my letter of October 2, 2007, the appropriate means to challenge the agency decision not to permit its employees to comply with the State court subpoenas *decus tecum* is an action in federal court under the Administrative Procedure Act. Accordingly, I re-urge my request that the subpoenas *decus tecum* be withdrawn.

If, however, you wish to proceed with the depositions as scheduled, I would prefer not to have the agency employees appear only to announce their intention to follow agency instructions and respectfully decline to testify and produce the subpoenaed records. I will be happy to appear at their scheduled depositions and put on the record their inability to proceed under agency instruction.

Please let me know how you prefer to proceed.

Thank you for your continuing courtesy on this thorny matter.

Sincerely yours,

DANIEL G. KNAUSS
United States Attorney
District of Arizona

/s/ RICHARD G. PATRICK
RICHARD G. PATRICK
Assistant United States Attorney

cc: (Via U.S. Mail & Facsimile)
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LEADER & LAUTZ, P.C.
1715 E. Skyline Drive, Suite 121
Tucson, Az. 85718
Phone: (520) 575-9040, Fax: (520) 575-9340
Dec. 19, 2007

David Ortez, Esq.
Federal Highway Administration
201 Mission St., Suite 1700
San Francisco, California 94105

Re: Melvin adv. United States, Admin. Form 95

Dear Mr. Ortez:

I represent Mark Melvin. Enclosed please find Mr. Melvin's Administrative Form 95 relating to injuries he received in a cross-median crash on December 21, 2005.

I have reviewed 28 C.F.R. § 14.2, and I believe that service upon your office via regular mail is adequate "presentation" of this Form 95. I am also sending a copy via facsimile.

If your agency believes I have not adequately presented this claim, I ask that you *immediately* let me know. The deadline for presenting this claim is Friday, December 21, 2007.

I am providing a courtesy copy of this to the United States' Attorney's Office in Phoenix.

Thank you.

LEADER & LAUTZ, P.C.

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.

JPL/jpl

cc: U.S. Attorney's Office, Phoenix, Az.

CLAIM FOR DAMAGE, INJURY, OR DEATH	INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	FORM APPROVED OMB NO. 1105-0008

1. Submit To Appropriate Federal Agency:	2. Name, Address of claimant and claimant's personal representative, if any. (See instructions on reverse.) (Number, Street, City, State and Zip Code)
Federal Highway Administration (FHWA)	Mark Melvin, c/o Leader & Lautz, P.C. 1715 E. Skyline, #121 Tucson, Az. 85718

3. TYPE OF EMPLOYMENT ☐ MILITARY ☒ CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (A.M. OR P.M.)
		unmarried	December 21, 2005	8:00 p.m.

8. Basis of Claim (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary.)

See attachment "Supplement, Administrative Form 95"

9. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

Steev Malkin, 914 East Osborn Rd. #316, Phoenix, Arizona 85014

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF DAMAGE AND THE LOCATION WHERE PROPERTY MAY BE INSPECTED. (See instructions on reverse side.)

2003 Acura

10. PERSONAL INJURY/WRONGFUL DEATH

STATE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE NAME OF INJURED PERSON OR DECEDENT.

See attached "Supplement, Administrative Form 95"

11. WITNESSES

NAME	ADDRESS (Number, Street, City, State, and Zip Code)
See attached "Supplement, Administrative Form 95"	

12. (See instructions on reverse.) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights.)
$3,000	$2,375,000		$2,378,000

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

13a. SIGNATURE OF CLAIMANT (See instructions on reverse side.)	13b. Phone number of person signing form	14. DATE OF SIGNATURE
John P. Leader, Esq.	520-575-9040	12/19/07

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM	CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS
The claimant is liable to the United States Government for the civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729.)	Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)

95-109 NSN 7540-00-634-4046 STANDARD FORM 95 PRESCRIBED BY DEPT. OF JUSTICE 28 CFR 14.2

100

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

15. Do you carry accident insurance? ☒ Yes If yes, give name and address of insurance company (Number, Street, City, State, and Zip Code) and policy number. ☐ No

Will supplement, upon request.

16. Have you filed a claim on your insurance carrier in this instance, and if so, is it full coverage or deductible? ☒ Yes ☐ No

Will supplement.

17. If deductible, state amount.

Will supplement.

18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts.)

Carrier paid underinsured motorist claim.

19. Do you carry public liability and property damage insurance? ☐ Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). ☐ No

Unsure what "public liability" insurance is. Mark's auto policy had property damage coverage.

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act should be submitted directly to the "appropriate Federal agency" whose employee(s) was involved in the incident. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items - Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 OR OTHER WRITTEN NOTIFICATION OF AN INCIDENT, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14. Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item #12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

(d) Failure to specify a sum certain will render your claim invalid and may result in forfeiture of your rights.

PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 et seq., 28 U.S.C. 2671 et seq., 28 C.F.R. Part 14.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid".

PAPERWORK REDUCTION ACT NOTICE

This notice is solely for the purpose of the Paperwork Reduction Act, 44 U.S.C. 3501. Public reporting burden for this collection of information is estimated to average 6 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Director, Torts Branch, Attention: Paperwork Reduction Staff, Civil Division, U.S. Department of Justice, Washington, D.C. 20530 or to the Office of Management and Budget. Do not mail completed form(s) to these addresses.

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Supplement, Administrative Form 95
Melvin v. United States

Box "8", Basis of Claim

On December 21, 2005, at milepost 11.4, SR 51, near Phoenix, Arizona, a ¼-ton Chevrolet pickup truck operated by Joshua McKillip lost control, crossed the freeway median and collided with a vehicle driven by Plaintiff Melvin.

SR 51 at the collision location was equipped with a 3-cable median barrier whose sole purpose was to prevent cross median crashes. It failed. Witnesses for the State (James Williams and Shan Chen) have testified that between July 1, 2000 and March 31, 2004, this barrier design allowed 101 cross median collisions on Valley freeways. Assuming this same rate of failure through the present, the low tension 3-cable barrier has allowed over 200 cross median collisions of Valley freeways.

Plaintiff Mark Melvin has an action pending against the State of Arizona and DMJM Arizona, claiming that both were responsible the selection and design of this barrier and they were negligent.

There have been several other lawsuits against the State of Arizona involving the subject low tension 3-cable median barrier design. In some of these lawsuits, witnesses called by the State of Arizona have made allegations regarding the FHWA. Those allegations, by State of Arizona witnesses, form the basis for this Administrative Form 95.

As you probably know, the federal government officially adopted Report 350's requirements in 1993. See

Federal Register, Vol. 58, No. 135, 7/18/93, pages 38293-38298.

Page 38297 states that five years hence, or, as of July 18, 1998, all new installations of traffic barriers and roadside safety features must meet Report 350's requirements:

> the FHWA (Federal Highway Administration) anticipates that approximately five years after adoption of this rule that all new installations of traffic barriers and other roadside safety features on NHS (National Highway System) projects will be only those judged to meet the testing and evaluation criteria in Report 350.

Mr. Melvin alleges that the State and DMJM failed to test and/or conduct and In Service Evaluation of its design as recommended by NCHRP Report 350, and that as a result, the cable median barrier in place on SR 51 on 12/21/05 was functionally inadequate. Mr. Melvin further alleges that if the State and DMJM had complied with Report 350's recommendations, the barrier in place would have been functionally adequate and would have prevented the subject collision.

In defending these allegations, the State makes several claims that the FHWA has endorsed the subject design and that it (the State) relied on these alleged endorsements. If the State's allegations (discussed herein) are true, the United States is partially at fault for the functionally inadequate barrier that was and is present on many State roadways, and partially at fault for Mr. Melvin's injuries.

Alleged 1998 Approval and "Blessing"

The State claims that prior to July 18, 1998, the FHWA deemed the subject design to be NCHRP Report 350 compliant.

In early 1998, an FHWA/AASHTO Report 350 Task Force was created to discuss the approaching deadline for Report 350 compliance. Dr. Dean Sicking was a consultant to this Report 350 Task Force. Dr. Sicking has testified, as a witness for the State of Arizona, that in 1998, the FHWA deemed ADOT's 3-cable design (33" top cable, 6" vertical spacings) to be 350 compliant. At page 21 of his testimony in *DeVries v. State*, Dr. Sicking testified:

> A. Basically the discussion was centered upon my original draft of the document, of this document which said that three cable barrier had met 350. And the discussion was what did that mean. Did that mean that the three cable barrier in the roadside design guide at the time which was 1996 roadside guideline had been approved as meeting 350 or was it limited to the Washington design which was the specific version of the three cable barrier that had been tested. **And that discussion led to the conclusion that all of the designs in the 350—the RDG of 1996 were going to be approved as meeting 350.**

Dr. Sicking relied upon a July 1, 1998 document titled: "AASHTO-FHWA Agreement Proposed By AASHTO 350 Task Force on NCHRP 350 Implementation." Relying on this document, Dr. Sicking testified at page 42 of

his *DeVries* testimony that the FHWA approved this design for use on the NHS in 1998:

> A. Again, you know, this document says that the three cable median barrier is approved for use on the national highway system **and so that's FHWA approval because it's an FHWA agreed to this document.** And they described this cable barrier, three cable median barrier, the same way it's described in the industry for the roadside design guide designs. And so everyone reading this document was intended to believe that all of the systems in the Roadside Design Guide would meet 350 and were approved by FHWA as meeting 350 and that's what the intent of this document was. And so an explicit approval wasn't needed for this design.

In describing the alleged 1998 FHWA "blessed" the design at issue:

> AASHTO agreed to it then FHWA blessed it. They were there. FHWA was there with us presenting the results saying we have agreed to this.

DeVries trial testimony, page 26.

The State also alleges, based on a September 12, 2005 memo from John Baxter, that the FHWA views the ADOT design as definitively 350 compliant:

> Q. . . . is there any question in your mind that this confirms your recommendation and that in fact the Federal Highway Administration views this as test level three equipment?
>
> A. No, there is no doubt in mind.

Sicking, p. 72-73.

Terry Otterness is a design engineer for the Arizona Department of Transportation (ADOT). At his May 9, 2006 deposition, Terry Otterness testified that the FHWA believes *all* 3-cable median barrier designs meet Report 350:

> . . . The position of the FHWA is they all meet NCHRP 350

(Page 121).

At his May 16, 2005 deposition in *DeVries*, Mr. Otterness similarly testified that the FHWA "has no problem" with its design:

> I have written opinions from experts that it meets or exceeds and I also have concurrence from the FHWA that does the final say-so on these things that he has no problem with the design.

(Page 55, line 1).

As discussed above, the design at issue has failed more than 200 times and has allowed more than 200 cross median crashes to occur. This design was not 350 tested or evaluated before being made operational. *If, as the State and Dr. Sicking allege, the FHWA "blessed" ADOT's design in 1998 and deemed it to be Report 350 complaint, this would have been negligent, since the State's design was neither 350 crash tested nor subjected to In Service Evaluation.*

Alleged 2005 Approval

On September 12, 2005 FHWA employee John Baxter wrote a memo stating:

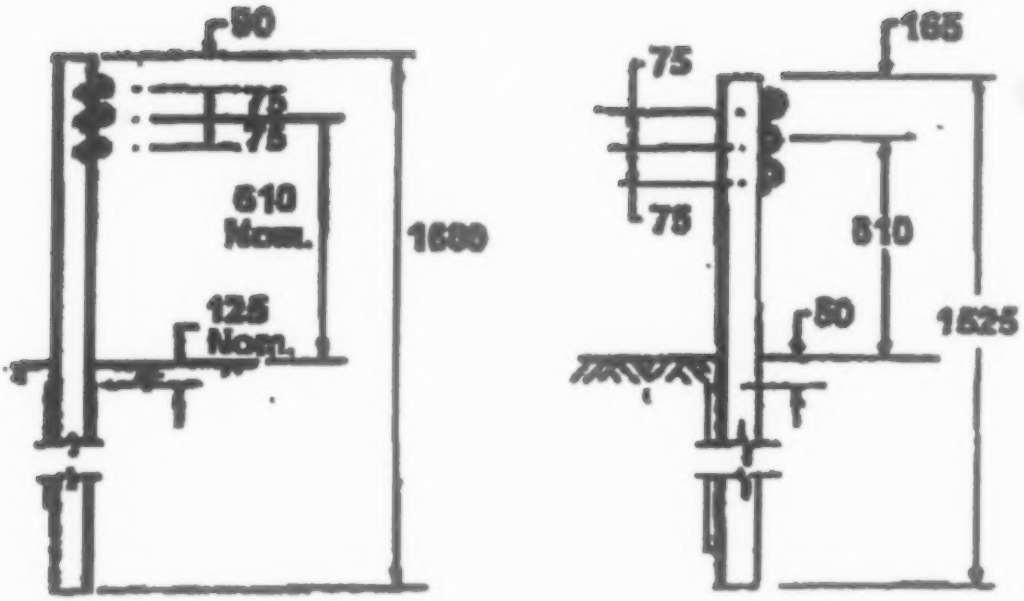
> "Note also that the 3-Strand cable median barrier shown in Figure C.1b in the 2002 AASHTO RDG) is classified as an NCHRP Report 350 TL-3 barrier. An earlier cable median barrier design, shown in Table C.1 in the 1996 edition of the RDG, has a greater separation between each cable which raises the top cable height to 33 inches while the bottom cable remains at a nominal 21-inch height. This design may also be considered acceptable as a TL-3 barrier."

Dr. Sicking has testified that the purpose of this Memo was to clarify an earlier mistake made by the FHWA. He alleges that previous FHWA memos discussing 350 approved designs erroneously omitted the ADOT design:

> A. . . . This is basically supplement to the omission from the 2000 letter to correct that ornission and bring it into conformance with the 1998 AASHTO FHWA agreement.

Sicking, page 73. Dr. Sicking was referring to the FHWA's February 14, 2000 memo, which is titled "Report 350 Nonproprietary Guardrails and Median Barriers".

The only cable barrier listed as 350 approved in this memo was the "Weak-Steel Post Cable (3-Strand) Guardrail (SGRO1a-b)":



SGR01a SGR01b

FIGURE B.1 3-Strand Cable

AASHTO Designation:	**SGR01a**	**SGR01b**
Post Type	S 75 x 8.5 steel	9 kg/m steel flanged channel
Post Spacing	5000	5000
Beam Type	19 diameter steel cables	19 diameter steel cables
Maximum Dynamic Deflection	3.5 m	3.5m

(1996 AASHTO Roadside Design Guide, Appendix "B"). As can plainly be seen, AASHTO designs "SGRO1-a" and "SGRO1-b" are both "roadside" cable barriers, that is, systems with the cables mounted on the same side of the post.

In addition to maintaining that the FHWA erred, the State also suggests that Mr. Baxter's September 12, 2005 memo is an unqualified endorsement of the design at issue.

There are substantial differences between what is described in Mr. Baxter's memo and the ADOT system design. Mr. Baxter's memo refers to the "cable median barrier design, shown in Table C.1 in the 1996 edition of the RDG, [which] has a greater separation between each cable which raises the top cable height to 33 inches while the bottom cable remains at a nominal 21-inch height":

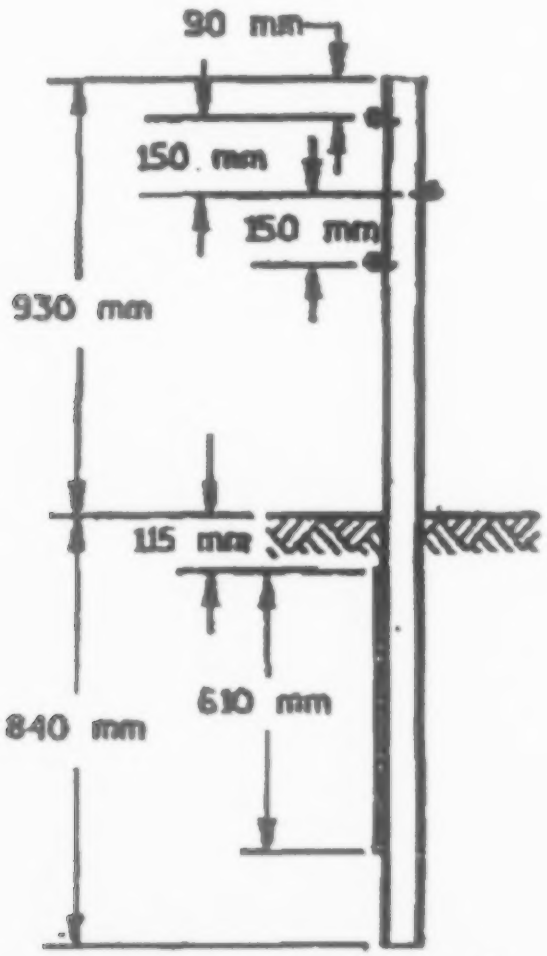


FIGURE C.13 Strand Cable

AASHTO Designation:	**None (The former single-strand cable "MBI" is obsolete.)**
Post Type	S75 X 8.5
Post Spacing	4880 mm
Beam Type	19 mm diam steel cable
Nominal Barrier Height	760 mm
Maximum Dynamic Deflection	3500 mm

As you probably know, this diagram shows only the post design for a 3-cable median barrier system. Various integral components of the ADOT/DMJM system design, including anchor points, tensioning mechanism and terminal posts and not addressed in Figure C.1.

The State should not represent that Mr. Baxter's memo addresses its overall system design. If that is the case, such an endorsement would be improper, in light the extremely poor performance of this design.

At the most, Mr. Baxter's memo can be read as providing a qualified general endorsement of median barrier cable spacings of 33", 27" and 21", but not an endorsement of ADOT/DMJM system design.

Terry Otterness of ADOT began seeking FHWA support of ADOT's overall system design in August, 2002, when Mr. Otterness wrote the FHWA seeking a finding of Report 350 compliance. Mr. Otterness has acknowledged that one of the reasons he sought FHWA support was to help ADOT's position in cable barrier litigation:

Q. Sir, one of the purposes of this letter was to avoid lawsuits, was it not?

A. Indirectly it was to put in—to certify that the design that had been put in the 1996 RDG and the one selected by ADOT was in compliance with the requirements of NCHRP 350 and to avoid claims that would come forth as a result of the system not being formally crash tested.

Q. So the answer is, yes, one of the reasons you wrote this letter was to avoid lawsuits, correct?

A. Indirectly, yes.

Q. And this letter was the beginning of a fairly lengthy back and forth with FHWA on this very issue, correct?

A. It took awhile, yes.

Q. It took awhile. In fact it took until September of 2005, correct?

A. That's when we got the final approval letter, yes.

(Terry Otterness, DeVries trial testimony, p. 32-33)

Funding

Finally, witnesses for the State have also suggested that the FHWA, by funding projects utilizing this design in 1999, endorsed or approved the design.

Conclusion

The allegations by the State of Arizona discussed herein, if true, give rise to a negligent highway design claim against the United States.

Box "10", Injuries

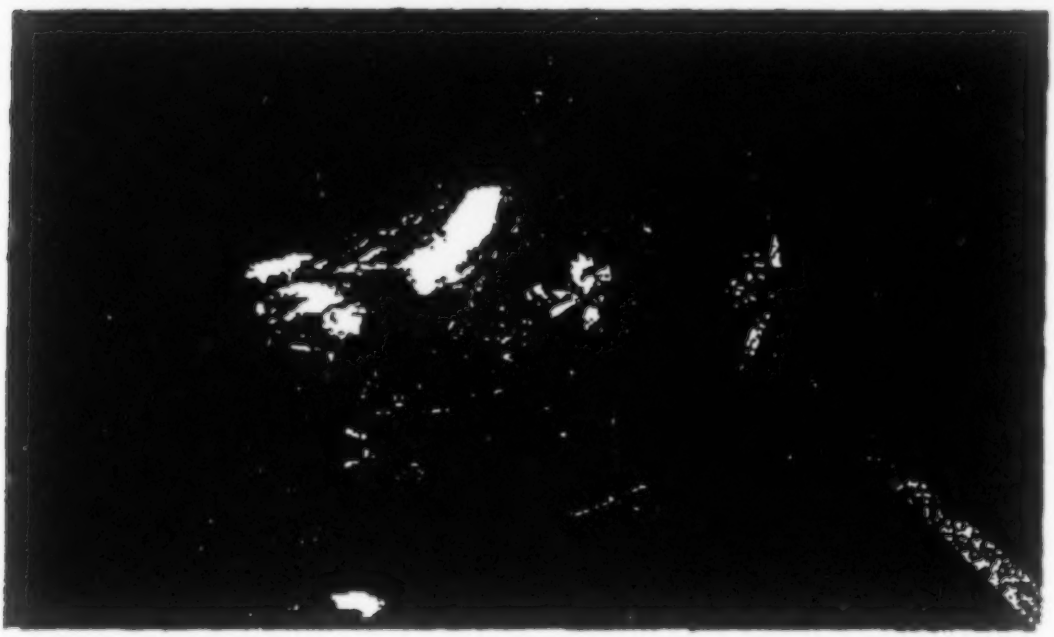
a. Economic

Mark Melvin has a lost wage claim of $25,400 and a property damage claim of $3,000 (Uniform Interrogatory Answers).

There are substantial health care provider liens.

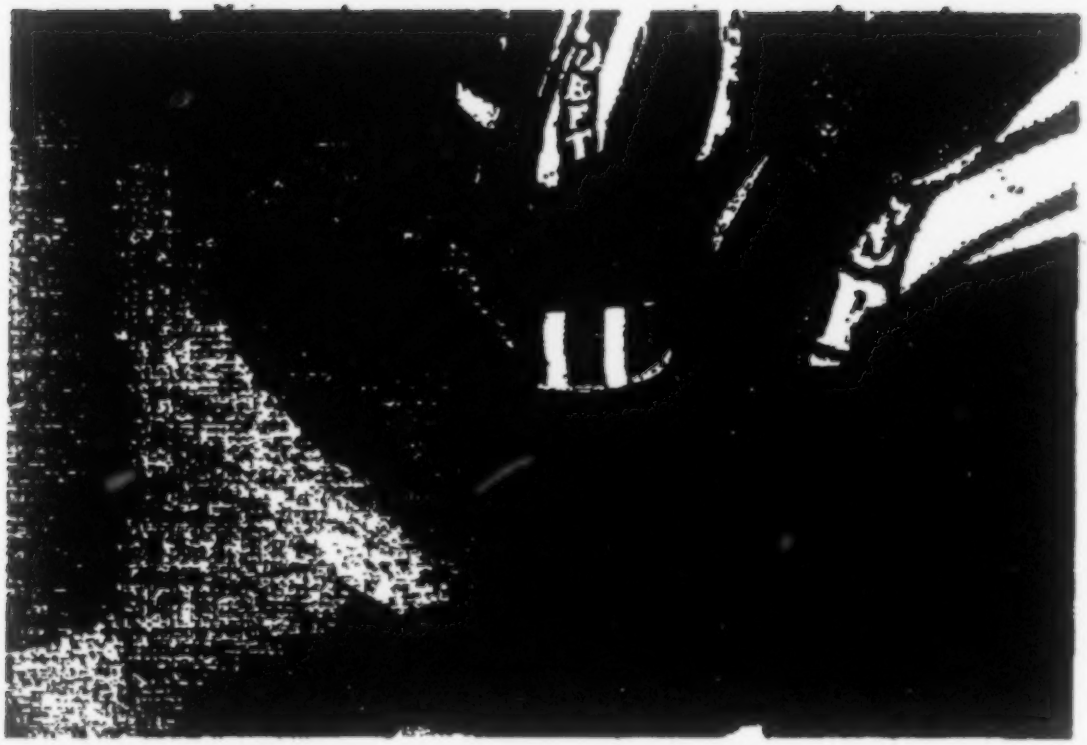
b. Non-economic

Mark suffered serious and extremely painful injuries in this collision. The damage to Mark's car illustrates the magnitude of the collision:



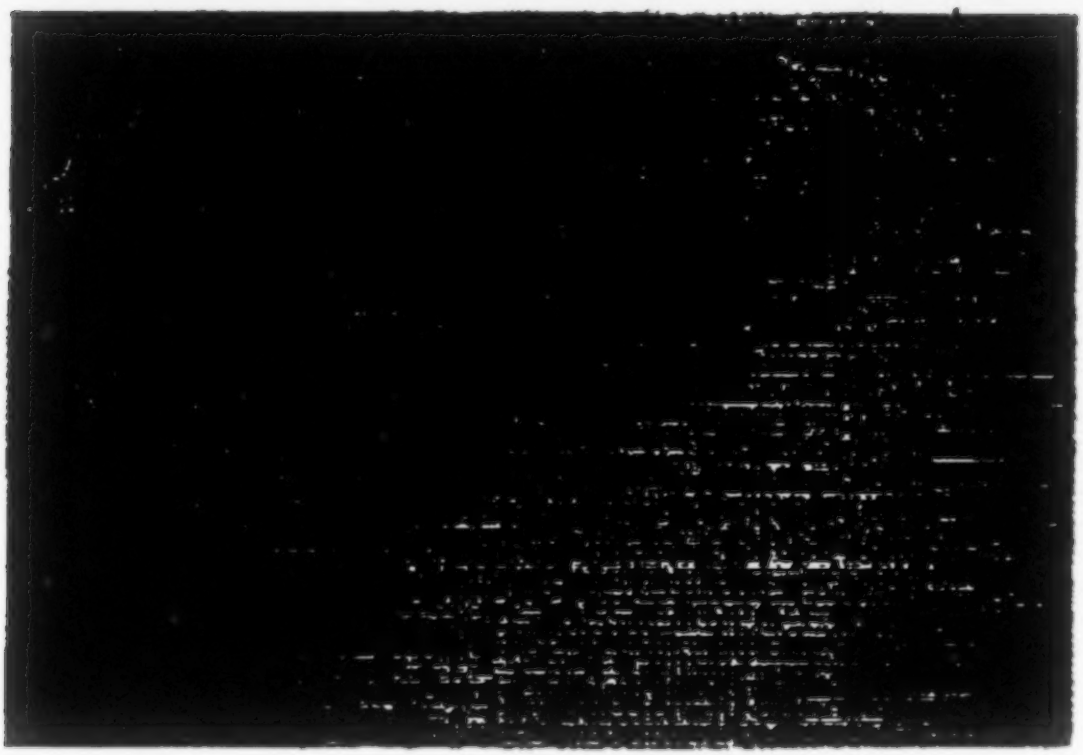
DPS Photo #11.

Mark received left leg injuries, including open left patellar avulsion fracture, closed left proximal third femoral diaphyseal fracture and open left knee joint with large, complex 18 x 4 cm wound, with exposed patellar bone:



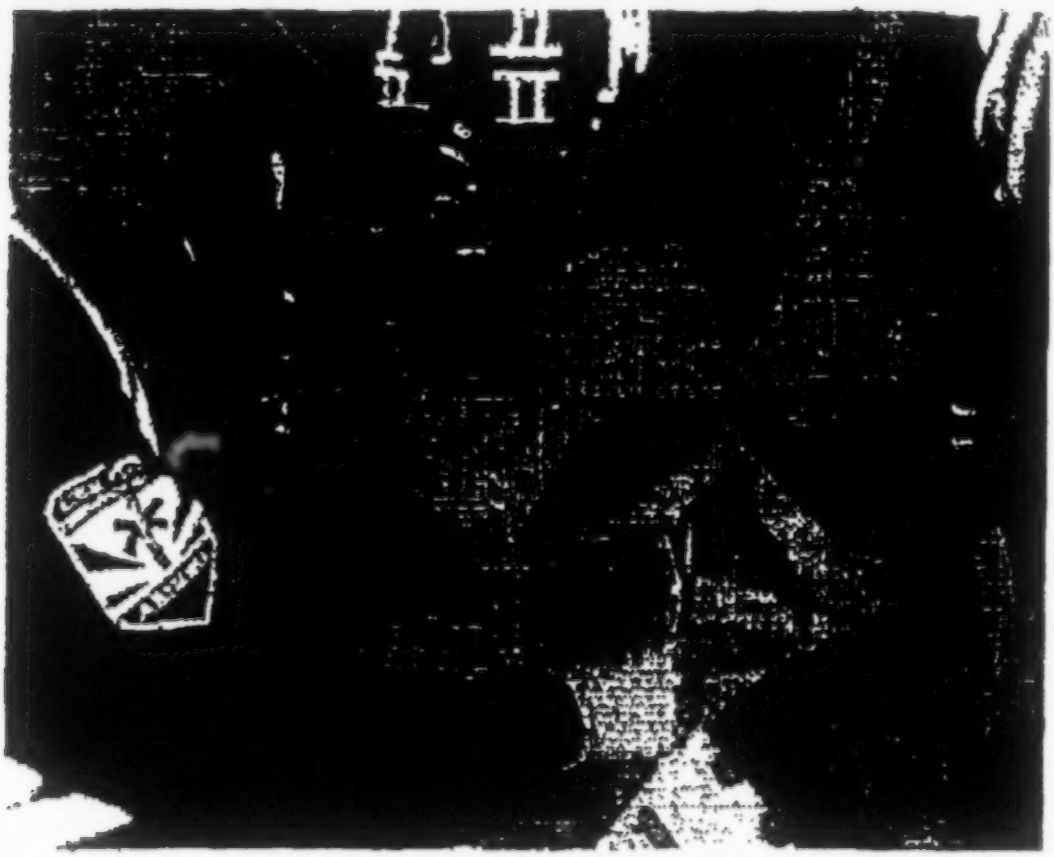
DPS Photo #123.

Photos 144 and 145 show Mark pre-extrication:





DPS Photo #124 shows Mark after he was extricated from his car:



Mark underwent extensive surgery on December 21-22, 2005, including debridement and irrigation of open left knee would and, repair of knew joint capsule and extensor mechanism, and retrograde intramedullary rodding of the left femur.

Mark also had a serious right hand fracture, an open distal phalanx fracture (right hand), that required debridement of open reduction, internal fixation of open distal phalanx transverse proximal shaft fracture, management of mallet avulsion fracture pinning, germinal matrix reinsertion and interphalangeal joint wash out performed by Dr. Champagne on December 26, 2005.

Mark has the following permanent *sequelae* from the collision:

- titanium rod, left femur
- Chronic left leg pain
- Chronic left leg numbness
- Extreme weakness with my left leg
- Moderate swelling with my lower left leg
- Scar on my left knee
- limitation on activities: unable to run or to climb stairs
- problems with bending or squatting
- pain on my right sciatica nerve/right lower back
- pain, swelling numbness and poor penmanship with my right hand
- numbness and tingling with my left arm and hand
- pain and weakness on my left shoulder.
- difficult sleeping/anxiety

Box "11", Witnesses

	State of Arizona Department of Transportation		
7	WITNESSES	Roberta Grady	
		Suzanne Kilani-McCauley	
		Michael Wilcox	

(From DPS Report).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No.

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANTS

[Filed: May 5, 2011]

COMPLAINT
(Federal Tort Claims Act; Negligence)

Plaintiff, by and through undersigned counsel, and for her complaint against the Defendant, states, alleges and complains as follows:

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code. This Court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the United States Code.

2. Defendant United States of America operates The Federal Highway Administration ("FHWA"). The

defendant employs, among others, highway design engineers and other personnel over whom it exercises exclusive control and supervision, with the right to employ and discharge such employees.

3. Upon information and belief, beginning in 1997 and continuing through February 19, 2005, and thereafter, the United States, through the FHWA, was involved in a decision relating to the need for, design and installation of median barriers on National Highway System roadways in and around the City of Phoenix, in the District of Arizona.

4. The United States, through the FHWA, had a duty to act reasonably and prudently with respect to decisions involving the need for, design and installation of low tension 3-cable median barriers in the District of Arizona.

5. The United States, through the FHWA, had a policy requiring that any roadway safety feature installed on a roadway that is or was part of the National Highway System (NHS) be crash tested and approved pursuant to National Cooperative Highway Research Project (NCHRP) Report 350.

6. That federal regulations and law, effective 1993, required that safety features installed on a roadway that is or was part of the National Highway System (NHS) be crash tested and approved pursuant to National Cooperative Highway Research Project (NCHRP) Report 350.

7. That Interstate 10 in the District of Arizona is a roadway that is and was at all times relevant hereto a part of the National Highway System, and thus, subject

to the mandatory NCHRP Report 350 compliance requirement.

8. In or around the 1999-2000 time frame the United States knowingly permitted a roadway safety device, that is, a low tension 3-cable median barrier, that had not been crash tested and/or approved pursuant to NCHRP Report 350, to be installed on Interstate 10 in Arizona.

9. On February 19, 2005, Plaintiff's decedent, Anthony Edward Booth, was the passenger in a 2001 Chrysler PT Cruiser travelling on eastbound I-10, at or near Milepost 138.9, in Phoenix, Arizona.

10. That on February 19, 2005, a non-Report 350 compliant cable median barrier was in place on I-10 at or near Milepost 138.9.

11. That the United States, through the FHWA, permitted the installation of this device, knowing of the Report 350 compliance requirement and knowing that the design in question had not been crash tested or approved pursuant to NCHRP Report 350 criteria.

12. That the sole purpose of this cable median barrier was to prevent errant vehicles from crossing the median and colliding with oncoming vehicles.

13. That despite the presence of the median barrier that was designed to prevent cross median crashes, the vehicle in which Mr. Booth was a passenger entered the highway median and crossed into westbound traffic lanes under reasonably foreseeable conditions and under conditions where a cable median barrier should have safely re-directed the vehicle in question.

14. The subject, non-Report 350 compliant barrier failed, however, and permitted the vehicle in which Mr. Booth was traveling to collide with another vehicle, causing fatal injuries to Mr. Booth and Laquitha Green, who was driving the PT Cruiser.

15. That the median cable barrier failed to adequately protect Mr. Booth, killing him and Ms. Green.

16. Plaintiff timely filed his Administrative Form 95, on or about December 20, 2010.

17. Plaintiff A.K.B., through his Conservator Marlene June, is a minor, and, under A.R.S. § 12-502, all statutes of limitation are tolled until such time as A.K.B. turns 18. Arizona law regarding tolling applies in this action. *Papa v. U.S.*, 281 F.3d 1004, 1009 (9th Cir. 2002).

18. A.K.B.'s date of birth is [redacted]. He is currently sixteen (16) years old, meaning that all statutes of limitation are and remain tolled, making his claim notice and this action timely.

19. Plaintiff A.K.B., through his Conservator Marlene June, brings this claim pursuant to Arizona's Wrongful Death Act, A.R.S. § 12-611, *et seq.*, on his own behalf, and on behalf of statutory beneficiaries Mary Morgan Bowden (the surviving mother of decedent Anthony Edward Booth), Naisha Ellis and Shahonda Booth (the surviving daughters of decedent Anthony Edward Booth), and Anthony Sherron Booth (the surviving son of decedent Anthony Edward Booth).

20. Plaintiffs A.K.B., through his Conservator Marlene June, Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth timely filed

Administrative Form 95s, on or about December 20, 2010.

21. The claims of Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth were likewise tolled until April 29, 2009 at the earliest, making their claim notices and wrongful death claims asserted herein timely.

22. Under both Arizona law and federal law, Also, the concealment of material facts by the Defendant will generally toll the statute of limitations. *See*, for example *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990 (2002), *Doe v. Roe*, 191 Ariz. 313, (1998), and *Gust, Rosenfeld & Henderson v. Prudential Ins. Co.*, 182 Ariz. 586 (1995) (Arizona law) and *Diminnie v. United States*, 728 F.2d 301 (6th Cir. 1984), citing *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, — U.S. —, 103 S. Ct. 3111, 77 L. Ed. 2d 1366 (1983).

23. The claims of Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth accrued no earlier than April 29, 2009 and their claim notices were timely filed within two years of accrual, and are thus timely.

24. By letter dated March 18, 2011, the Federal Highway Administration denied all of Plaintiffs' Administrative Claims, vesting this Court with jurisdiction.

25. The discretionary function exception, codified at 28 U.S.C. § 1346(b)(1), does not apply to the acts and omissions at issue in this matter

26. The discretionary function exception does not apply where, as here, the government agency acts in violation of its own mandatory directive. *See*, for exam-

ple, *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995), *Kelly v. U.S.*, 241 F.3d 755, 762 (9th Cir. 2001).

27. The discretionary function exception likewise does not apply where, as here, the decisions in question are not "policy" decisions. *Berkovitz v United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

COUNT ONE — NEGLIGENCE

28. The United States, through the FHWA, owed Plaintiff's decedent and all motorists traveling on NHS roadways a duty of due care.

29. The United States, through the FHWA, breached its duty of due care and was negligent by failing to comply with its own policies and/or federal rules/law mandating that any safety device installed on the NHS be crash tested and approved pursuant to NCHRP Report 350.

30. Had a crashworthy, appropriately tested, NCHRP Report 350 compliant barrier been present on February 19, 2005, the death of Plaintiff's decedent would have been prevented.

31. That as a direct result of said negligence, Plaintiff's decedent died, causing Plaintiff's wrongful death damages under A.R.S. § 12-611, *et. seq.*, including but not limited to severe and permanent physical, mental and emotional injuries, for which recovery is permitted under Arizona's wrongful death statute.

COUNT TWO — NEGLIGENCE *PER SE*

32. Plaintiff realleges and incorporates by reference each of the allegations set forth above, as if fully rewritten herein.

33. That the United States, by and through its agency, the FHWA, owed Plaintiff's decedent a duty of due care.

34. That the United States had a federally mandated safety duty, as set forth at 23 C.F.R Part 625, and Federal Register, Vol. 58, No. 135 (July 18, 1993), page 38293 *et seq.*, to allow only NCHRP Report 350 crash tested and approved devices on NHS roadways.

35. That the United States, through the FHWA, failed to comply with the aforementioned safety rules and regulations and breached duties owed to Plaintiff's decedent and committed negligence *per se*. *Patterson v. Thunder Pass*, 214 Ariz. 435, 438 (App. 2007), *Brannigan v. Raybuck*, 136 Ariz. 513, 517 (1983).

36. Had a crashworthy, appropriately tested, NCHRP Report 350 compliant barrier been present on February 19, 2005, the death of Plaintiff's decedent would have been prevented.

37. That as a direct result of said negligence *per se*, Plaintiff's decedent died, causing Plaintiff's wrongful death damages under A.R.S. § 12-611, *et. seq.*, including but not limited to severe and permanent physical, mental and emotional injuries.

WHEREFORE, Plaintiff respectfully requests that this Court grant her judgment against Defendant for:

a. Compensatory wrongful death damages in the amount of $1,000,000 per Plaintiff;

b. Costs incurred herein;

c. Such other relief as the Court deems appropriate.

DATED this 5th day of May, 2011.

THE LEADER LAW FIRM

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-11-00901-PHX-SRB

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: July 11, 2011]

MOTION TO DISMISS

Defendant United States of America submits this Motion to Dismiss under Rule 12(b)(1), Fed. R. Civ. P. The basis of this motion is twofold: (1) the statute of limitations has run on Plaintiff's tort claim; and (2) the Federal Aid Highway Act does not provide for a private cause of action. This motion is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

This Federal Tort Claims Act (FTCA) case arises from an automobile accident which took place on February 19, 2005, at or near Milepost 138.9 on Interstate 10.

Complaint at ¶ 9. As a result of the accident, Anthony Edward Booth died. *Id.* Plaintiff claims that the cable median barrier failed and permitted Mr. Booth's vehicle to collide with another vehicle, causing his fatal injuries. *Id.* at ¶¶ 10-15.

Plaintiff filed an Administrative Form 95 on or about December 20, 2010. *Id.* at ¶ 16. Plaintiff is a minor. *Id.* at ¶ 17. He brings this claim, through his Conservator Marlene June, on his own behalf and that of statutory beneficiaries Mary Morgan Bowden, Naisha Ellis and Shahonda Booth and Anthony Sherron Booth. *Id.* at ¶¶ 17-20.

Plaintiff's Complaint alleges two theories of liability. The first theory is that the United States, through the Federal Highway Administration (FHWA), owed Plaintiff's decedent a duty of care and that it breached that duty by failing to comply with its own policies and/or federal rules/law mandating that any safety device installed on the National Highway System (NHS) be crash tested and approved pursuant to National Highway Cooperative Research Highway Research Project (NCHRP) Report 350. *Id.* at ¶¶ 28-29. Plaintiff alleges that if a "crashworthy, appropriately tested, NCHRP Report 350 Compliant barrier had been present on February 19, 2005, the death of Plaintiff's decedent would have been prevented." *Id.* at ¶ 30.

Plaintiff's second theory of liability is negligence *per se*. *See* Complaint at Count II. Under this theory, Plaintiff alleges that the FHWA's failure to comply with safety rules and regulations breached duties owed to Plaintiff's decedent, and thus, the United States is negligent *per se*. *Id.* at ¶¶ 34-35. Plaintiff claims that the

United States had a federally-mandated duty to allow only NCHRP Report 350 crash tested and approved devices on NHS roadways, and, if the United States had complied with these rules and regulations, Mr. Booth's death could have been prevented. *Id.* at ¶¶ 34 and 36.

II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

A. Legal Standard for Fed. R. Civ. P. 12(b)(1)

Under Fed. R. Civ. P. 12(b)(1) a defendant may move to dismiss for lack of subject matter jurisdiction. When a defendant challenges the veracity of the jurisdictional facts underlying a complaint, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Pub. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979). Further, in considering a 12(b)(1) motion to dismiss, the court "is not restricted to the face of the pleadings," *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), and may consider affidavits and other evidence supporting or contradicting a petitioner's jurisdictional allegations. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Finally, on a 12(b)(1) motion to dismiss the plaintiff bears the burden of establishing that subject matter jurisdiction exists. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Thornhill Pub. Co.*, 594 F.2d at 733.

Plaintiff's action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because the Court lacks subject matter

jurisdiction as the United States has not waived sovereign immunity. It is well settled that the United States, as sovereign, may not be sued without its consent, and the terms of its consent define the court's jurisdiction to hear the suit. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). This immunity from suit may be waived by the United States, but any such waiver must be unequivocally expressed and not implied. *Mitchell*, 445 U.S. at 538; *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Hutchinson v. United States*, 677 F.2d 1322 (9th Cir. 1982). Moreover, a waiver of sovereign immunity "must be construed strictly in favor of the sovereign" and may not be enlarged beyond the requirements of the language waiving the immunity. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citation omitted). The plaintiff in a suit against the United States bears the burden of demonstrating that sovereign immunity has been waived, and without this showing the court lacks jurisdiction to hear the case. *See Gilbert*, 756 F.2d at 1458-59; *Stout v. United States*, 229 F.2d 918, 919 (2d Cir. 1956).

B. Under the FTCA, the Statute of Limitations is Two Years and There is no Tolling for Infancy.

Plaintiff's Complaint lacks subject matter jurisdiction under the FTCA. Plaintiff presented his FTCA claim to the agency on December 20, 2010. Complaint at ¶ 16. However, the cause of action arose on February 19, 2005, the date of the accident. *Id.* at ¶ 9. As outlined below, the statute of limitations for FTCA claims is two years from the date the cause of action accrued and there is no tolling of the statute of limitations for the claimant's infancy.

In an FTCA action, the time limits governing claims and actions under the FTCA are contained in 28 U.S.C. § 2401(b), which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or regular mail, of notice of final denial of the claim by the agency to which it was presented.

The plaintiff has the burden of proving that the claim was timely presented. *See, e.g. Johnson v. Smithsonian Institution*, 189 F.3d 180, 189 (2d Cir. 1999) ("The burden is on the plaintiff to plead and prove compliance with § 2401(b)."); *In re Agent Orange Prod. Liab. Litigation*, 818 F.2d 210, 214 (2d Cir. 1987) (same). In *United States v. Kubrick*, 444 U.S. 111, 117-118, n.10 (1979), the Supreme Court held that the FTCA is a waiver of the United States' sovereign immunity and that the FTCA's statute of limitations "is a condition of that waiver." In an action against the United States, "there must be a waiver of immunity; but no waiver exists under 28 U.S.C. § 1346(b) once the two-year period of limitations has run. Thus, after the two-year period the district court has no jurisdiction over the action." *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959). *See also Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). Compliance with the statute's time limits is a jurisdictional requirement. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir. 2002), *opinion amended and reh'g denied*, 298 F.3d 754 (9th Cir. 2002).

The law is well settled that neither State statutes of limitations nor State tolling provisions apply in FTCA litigation. The courts have repeatedly held that the time limits prescribed by 28 U.S.C. § 2401(b), rather than time limits prescribed by State statutes of limitations, apply to Federal Tort Claims Act claims. *See, e.g., Poindexter v. United States*, 647 F.2d 34, 36-37 (9th Cir. 1981); *United States v. Westfall*, 197 F.2d 765, 766 (9th Cir. 1952). The case law is uniform that the time periods in section 2401(b) are not tolled or postponed because of the infancy of the claimant. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1011 (9th Cir. 2002); *Landreth v. United States*, 850 F.2d 532, 534 (9th Cir. 1988); *Fernandez v. United States*, 673 F.2d 269, 271 (9th Cir. 1982). There is no tolling for infancy even where the infant's only parent abandons the child and no legal guardian has been appointed during the two-year period following injury. *Zavala v. United States*, 876 F.2d 780 (9th Cir. 1989).[1]

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[1] The cases holding that the claimant's infancy is not grounds for tolling the FTCA's limitations periods are in accord with "[t]he blackletter rule, recognized by the Supreme Court since at least 1883, * * * that a statute of limitations runs against all persons, even those under a disability, unless the statute expressly provides otherwise." *Vogel v. Linde*, 23 F.3d 78, 80 (4th Cir. 1994), *citing Vance v. Vance*, 108 U.S. 514, 521 (1883) ("The exemptions from the operation of statutes of limitations, usually accorded to infants * * * , do not rest upon any general doctrine of the law that they cannot be subjected to their action, but in every instance upon the express language in those statutes giving them time, after majority * * * , to assert their rights."). Although numerous bills have been introduced to expressly provide for tolling of the FTCA's limitations periods during infancy or other legal disabilities (*e.g.*, H.R. 2403, 81st Cong., 1st Sess. (1949); H.R. 7184, 89th Cong., 1st Sess. (1965); H.R. 5713, 90th Cong., 1st Sess. (1967); H.R. 3260,

Plaintiff's Complaint fails to allege a viable claim because the two-year statute of limitations had already run on Plaintiff's tort claim when he submitted it on December 20, 2010. Plaintiff presented the claim to the agency approximately five years and seven months from the date of the accident, February 19, 2005, when the cause of action accrued. It does not matter that Plaintiff is a minor; the statute of limitations under the FTCA is not tolled, even if Arizona statutory law allows for tolling for infancy. Therefore, this Court does not have subject-matter jurisdiction to hear Plaintiff's tort claims and should dismiss them pursuant to Fed. R. Civ. P. 12(b)(1).

C. Plaintiff's Claim That Defendant Concealed Material Facts Does not Toll the Statute of Limitations.

In an effort to overcome his statute of limitations problem, Plaintiff's Complaint alleges that the statute of limitations should be tolled because he claims that United States concealed material facts. Complaint at ¶ 22. Plaintiff further contends that the cause of action did not accrue until April 29, 2009. *Id* at 23. However, Plaintiff's attempt to toll the statute of limitations by alleging concealment must fail.

As a general rule, a claim accrues "when a plaintiff knows or has reason to know of the injury which is the basis for the action." *Gibson v. United States*, 781 F.2d 1334, 1344 (9th Cir. 1986). Plaintiff has the burden of establishing that the statute of limitations that has run

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101st Cong., 1st Sess. (1989); H.R. 3261, 101st Cong., 1st Sess. (1989)), none has ever been enacted into law. *See also McCall v. United States*, 310 F.3d 984, 988 n.2 (7th Cir. 2002).

should be equitably tolled. *Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir. 1980). Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations period. *Lehman v. United States*, 154 F.3d 1010, 1019 (9th Cir. 1988). For equitable tolling to apply, a plaintiff must show that an affirmative misrepresentation or affirmative concealment of a material fact by the government somehow prevented or made impossible the filing of a timely complaint, and that the plaintiff neither knew nor reasonably should have known the material facts. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). However, as a general rule, ignorance of the involvement of government employees is irrelevant to the accrual of a federal tort claim. *Dyniewicz v. United States*, 742 F.2d 484, 487 (9th Cir. 1984).

In *Gibson*, the Ninth Circuit refused to expand the Supreme Court's holding in *Kubrick* "to delay accrual of a federal tort claim until plaintiff knows or has reason to know of the culpability of federal agents." 781 F.2d at 1344. In *Gibson*, the plaintiffs alleged that government agents were responsible for burning down their garage. They argued that their claim did not accrue for purposes of the statute of limitations until more than three years after the fire, when they finally learned of the government's alleged complicity in the arson. *Id.* at 1343-44. The Ninth Circuit held that the *Dyniewicz* case controlled and that the claim accrued when the plaintiff's learned of the property damage itself. *Id.* at 1344.

In *Dyniewicz*, the plaintiff's filed a wrongful death claim against the State of Hawaii for the deaths of a husband and wife who had died in a flood. *Dyniewicz*, 742 F.2d at 485. While a timely state court action was on-

going, but approximately two years and three months after the deaths, the plaintiffs learned that National Park Rangers might have played a part in causing the deaths. *Id.* The Ninth Circuit held that the claim was time-barred because it was not brought within two years of its accrual. *Id.* at 486.

Similarly in *Hensley v. United States*, the Ninth Circuit held under facts similar to *Dyniewicz* and the instant case that there was no equitable tolling. *Hensley v. United States*, 531 F.3d 1052, 1058 (9th Cir. 2008). In *Hensley*, a motorist was injured on a Navy base when her vehicle was struck from behind by a Navy officer. The plaintiff claims she was misled because a military police officer advised them that they should follow up with their insurance company, and that the military police failed to provide the plaintiff with a copy of their report or any document identifying the officer as an active duty member of the military. *Id.* at 1058. She also argued that her insurance company affirmatively misled her into thinking she had a claim against the officer in his personal capacity. *Id.* Finally, she claimed that the government's timing of the certification of the officer as a federal employee was calculated to preclude a timely tort claim. *Id.* However, the Ninth Circuit rejected these arguments. The Ninth Circuit held that the claim accrued when the plaintiffs "knew both the facts of the injury and its immediate cause." *Id.* at 1057 (citing to *Dyniewicz*, 742 F.2d at 486.) The Ninth Circuit stated that at the moment the officer struck the Ms Hensley's car with his own, the Hensleys knew both the fact of the injury and its immediate cause. That is, the injury was immediately apparent and the cause of the injury was obvious. *Id.* at 1057.

In the instant case, Plaintiff's decedent was killed because of an auto accident in which a vehicle crashed through cable barriers. There was no doubt as to the injury or the cause. In fact, Plaintiff was a party to a lawsuit filed 2006 against the State of Arizona and Sherwood Fence, CV2006-002287, in which he was represented by the same attorney as this case, John Leader. See Exhibit 1: Docket sheet from and Complaint filed in *Morgan, et al. v. State of Arizona, et al.*, CV2006-002287. Subsequently, Plaintiff's counsel represented Plaintiff Mark Melvin in *Melvin v. State of Arizona and DMJM*, CV2006-018897, which also involved an accident where a similar cable barrier on Highway 51 which runs through Phoenix, Arizona, was purportedly defective. *See* Exhibit 2: Complaint filed in *Melvin v. State of Arizona and DMJM*, CV2006-018897.

During the *Morgan* and *Melvin* litigation, Plaintiff's counsel was in direct communication on several occasions with agency counsel for the Federal Highway Administration, David Ortez, Esq., and also submitted FOIA (Freedom of Information Act) requests to the agency. *See* Exhibit 3: November 7, 2006-letter to David Ortez, Esq., Federal Highway Administration from John P. Leader, Esq.; Exhibit 4: January 8, 2007-letter to David Ortez, Esq., from John P. Leader; Exhibit 5: May 17, 2007-letter to David Ortez, Esq., from John P. Leader. In correspondence with the FHWA, Plaintiff's counsel makes numerous references to Report 350 and purported issues with the cable barriers which are the subject of the instant litigation. In one letter, Plaintiff's counsel states: "A key issue in these cases is whether the FHWA, as of late 1999, had deemed this design to be 350 compliant or approved its use on the NHS." Exhibit 3

at page 2. In the same November 7, 2006-letter which was drafted within the statute of limitations for this case, Plaintiff's counsel states: "In summary, the State of Arizona has represented in litigation that the FHWA, in July 1998, deemed ADOT's proposed 3-cable median barrier to be Report 350 compliant, and presumably, approved for use on the NHS." *Id.* at page 6.

Plaintiff's counsel also represented a plaintiff in two other lawsuits against the United States which was filed in the United States District Court for the District of Arizona, *Melvin v. United States*, CIV 08-950 DKD PHX, and *Melvin v. United States*, CIV 08-1666 PHX SRB. In those cases, the plaintiff sued the United States under the FTCA for the same issues involving the cable barriers as in the instant case, although it was a different accident. In both *Melvin* Complaints filed May 20, 2008 and September 10, 2008, respectively, the plaintiff who was represented by John Leader, counsel in this case, alleged that the State of Arizona produced witnesses in another case, *DeVries v. State of Arizona*, CV2003-022432, who testified that FHWA employees made decisions regarding the cable barriers which would subject the United States to liability. *See Melvin v. United States*, CIV 08-950 DKD PHX, Dkt. 1 at ¶¶ 14-16, and *Melvin v. United States*, CIV 08-1666 PHX SRB, Dkt. 1 at ¶¶ 14-16. According to Plaintiff's counsel's letter to David Ortez, Esq., dated November 7, 2006, he had just concluded trial in the *DeVries* case. Exhibit 3 at page 5. Thus, certainly by the time Plaintiff's counsel sent his November 7, 2006-letter to the FHWA counsel, Plaintiff, through his counsel, was well-aware of the potential liability of the United States.

Thus, there was no concealment of material facts. The FHWA's involvement in the barrier cables at issue in this litigation have been known to Plaintiff through his attorney as least since November 7, 2006, which is well-within the two-year statute of limitations which began on February 19, 2005. In the absence of fraudulent concealment, it is the plaintiff's burden to determine whether and whom to sue. *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981). There was no concealment—let alone *fraudulent* concealment—in this case and the statute of limitations should not be tolled.

D. No Private Cause of Action Exists Under the Federal Highway Safety Act

Plaintiff alleges that the United States, through the FHWA, was negligent in failing to comply with its own policies, rules and laws mandating that any safety device installed on the NHS be crash tested and approved pursuant to NCHRP Report 250. Complaint at ¶¶ 28-29. Plaintiff also alleges that the United States was negligent *per se* for failing to comply with 23 C.F.R. Part 625 and Federal Register, Vol 58, No. 135 (July 18, 1993), page 28293 et seq., by allowing a barrier he claims was not crash worthy per NCHRP Report 350 to be installed. *Id.* at ¶¶ 33-36. These claims fail because the Federal Highway Safety Act does not provide for a private cause of action.

1. Federal Funding of Highways.

The Federal Highway Administration (FHWA) administers the program implementing the Federal Aid Highway Act (the Federal Aid Highway Program, FHP) pursuant to congressional authorization (generally every

six years). These statutory authorizations apportion Federal Highway Trust Funds among the states. *See* 23 U.S.C. § 104(b). The Federal Aid Highway Act, 23 U.S.C. § 101 et seq., required the FHWA to promulgate regulations relating to the specifications for highway design. One such regulation is 23 C.F.R. Part 625.

On June 12,1997, the Arizona Department of Transportation (ADOT) and the Federal Highway. Administration (FHWA) entered into an Operating Partnership Agreement pursuant to the Federal-Aid Highway Act, 23 U.S.C. § 101, *et seq.* and the Intermodal Surface Transportation Efficiency Act (ISTEA), Pub. Law 102-240, Dec. 18, 1991, " . . . which provides greater flexibility on behalf of state and local governments in determining transportation solutions using Federal-aid highway funds." The agreement provided that ADOT would administer all projects, including the project which is the subject of this matter, in full compliance with all applicable Federal Statutes, Executive order, and FHWA regulations and standards. The agreement provided ADOT with the ability and responsibility to approve or reject designs, design submissions, project plan, specifications and estimates, inspections and to oversee and ensure proper administration of project construction pursuant to 23 U.S.C. § 106.

On November 8, 1999, after receipt from ADOT of both a Benefit/Cost analysis and a request to authorize funds for the cable median barrier project, FHWA authorized funding for ADOT to proceed with the construction phase of this cable median barrier project.

2. Origin of Report 350

In 1993, the National Cooperative Highway Research Program (NCHRP) issued Report 350, "Recommended Procedures for the Safety Performance Evaluation of Highway Features." *See* Report 350—Recommended Procedures for the Safety at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_rpt_350-a.pdf. Report 350 contains recommended procedures and guidance for evaluating the safety performance of various highway safety features including longitudinal barriers which include roadside and cable median barriers. Initially, Report 350 was included in the "Guides and References" section of 23 C.F.R. § 625. However, on April 1, 1997, the "Guides and References" section was removed from the C.F.R. and the information placed in the "Federal-Aid Policy Guide," a source that contains FHWA's current policies and non-regulatory procedural guidance.

3. No Private Cause of Action Exists Under Cort v. Ash Analysis

In determining whether Congress intended to create a private right of action under a federal statute, courts consider (1) whether the plaintiffs are within the class for whose special benefit the statute was enacted, (2) whether there is evidence of explicit or implicit legislative intent to create or deny a private remedy, (3) whether a private remedy is consistent with or necessary to the purposes underlying the statutory scheme, and (4) whether a federal remedy is inappropriate because the subject matter involves an area that is primarily of concern to the states. *Resident Council of Allen Parkway Vill. v. U.S. Dept. of Hous. & Urban Dev.*, 980 F.2d 1043,

1053 (5th Cir. 1993) (*citing Cort v. Ash*, 422 U.S. 66, 68 (1975)).

Just receiving federal funds from the Federal Aid Highway Act does not imply a private right of action. Generally, courts apply the *Cort* standard of evaluating a private right of action under a federal statute. The courts have held that Congress did not intend to create a private right of action for the Federal Aid Highway Act, as well as other related transportation acts, such as the Federal Highway Safety Act. *Ramos Pinero v. Commonwealth of Puerto Rico*, 359 F. Supp. 2d 56, 56 (D.P.R. 2005) *aff'd sub nom. Ramos-Pinero v. Puerto Rico*, 453 F.3d 48 (1st Cir. 2006); *Smith v. Bernier*, 701 F. Supp. 1171, 1173 (D. Md. 1988); *Miller v. United States*, 710 F.2d 656, 667 (10th Cir. 1983); *Morris v. United States*, 585 F. Supp. 1543, 1548 (W.D. Mo. 1984).

Thus, while the State of Arizona received federal funding for highways, such funding and any regulations with respect to that funding such as 23 C.F.R. § 625 or Report 350 do not provide for a private cause of action for Plaintiff in this case.

III. CONCLUSION

Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction. The statute of limitations has run and the Federal Highway Aid Act provides no private cause of actions. Furthermore, Plaintiff's claim of concealment of material facts is without merit. Defendant requests that the Court grant its motion to dismiss for the reasons stated above..

Respectfully submitted this 11th day of July, 2011.

DENNIS K. BURKE
United States Attorney
District of Arizona

/s/ ANN E. HARWOOD
ANNE E. HARWOOD
Assistant U.S. Attorney

CERTIFICATION

I hereby certify that on July 11, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

THE LEADER LAW FIRM
John P. Leader, Esq.
3567 E. Sunrise Dr., Ste. 133
Tucson, AZ 85718

/s/ *Jodi R. Hershey*
Office of the U.S. Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No.

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Aug. 12, 2011]

FIRST AMENDED COMPLAINT
(Federal Tort Claims Act; Negligence)

Plaintiff, by and through undersigned counsel, and for her complaint against the Defendant, states, alleges and complains as follows:

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code. This Court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the United States Code.

2. Defendant United States of America operates The Federal Highway Administration ("FHWA"). The

defendant employs, among others, highway design engineers and other personnel over whom it exercises exclusive control and supervision, with the right to employ and discharge such employees.

3. Upon information and belief, beginning in 1997 and continuing through February 19, 2005, and thereafter, the United States, through the FHWA, was involved in a decision relating to the need for, design and installation of median barriers on National Highway System roadways in and around the City of Phoenix, in the District of Arizona.

4. The United States, through the FHWA, had a duty to act reasonably and prudently with respect to decisions involving the need for, design and installation of low tension 3-cable median barriers in the District of Arizona.

5. The United States, through the FHWA, had a policy requiring that any roadway safety feature installed on a roadway that is or was part of the National Highway System (NHS) be crash tested and approved pursuant to National Cooperative Highway Research Project (NCHRP) Report 350.

6. That federal regulations and law, effective 1993, required that safety features installed on a roadway that is or was part of the National Highway System (NHS) be crash tested and approved pursuant to National Cooperative Highway Research Project (NCHRP) Report 350.

7. That Interstate 10 in the District of Arizona is a roadway that is and was at all times relevant hereto a part of the National Highway System, and thus, subject

to the mandatory NCHRP Report 350 compliance requirement.

8. In or around the 1999-2000 time frame the United States knowingly permitted a roadway safety device, that is, a low tension 3-cable median barrier, that had not been crash tested and/or approved pursuant to NCHRP Report 350, to be installed on Interstate 10 in Arizona.

9. On February 19, 2005, Plaintiff's decedent, Anthony Edward Booth, was the passenger in a 2001 Chrysler PT Cruiser travelling on eastbound I-10, at or near Milepost 138.9, in Phoenix, Arizona.

10. That on February 19, 2005, a non-Report 350 compliant cable median barrier was in place on I-10 at or near Milepost 138.9.

11. That the United States, through the FHWA, permitted the installation of this device, knowing of the Report 350 compliance requirement and knowing that the design in question had not been crash tested or approved pursuant to NCHRP Report 350 criteria.

12. That the sole purpose of this cable median barrier was to prevent errant vehicles from crossing the median and colliding with oncoming vehicles.

13. That despite the presence of the median barrier that was designed to prevent cross median crashes, the vehicle in which Mr. Booth was a passenger entered the highway median and crossed into westbound traffic lanes under reasonably foreseeable conditions and under conditions where a cable median barrier should have safely re-directed the vehicle in question.

14. The subject, non-Report 350 compliant barrier failed, however, and permitted the vehicle in which Mr. Booth was traveling to collide with another vehicle, causing fatal injuries to Mr. Booth and Laquitha Green, who was driving the PT Cruiser.

15. That the median cable barrier failed to adequately protect Mr. Booth, killing him and Ms. Green.

16. Plaintiffs timely filed ~~his~~ their Administrative Form 95s on or about December 20, 2010. Under the doctrine of equitable tolling, Plaintiffs' Form 95s and this action are timely.

~~17. Plaintiff A.K.B., through his Conservator Marlene June, is a minor, and, under A.R.S. § 12-502, all statutes of limitation are tolled until such time as A.K.B. turns 18. Arizona law regarding tolling applies in this action. *Papa v. U.S.*, 281 F.3d 1004, 1009 (9th Cir. 2002).~~

~~18. A.K.B.'s date of birth is March 9, 1995. He is currently sixteen (16) years old, meaning that all statutes of limitation are and remain tolled, making his claim notice and this action timely.~~

17. Plaintiffs acknowledge that their Administrative Form 95s were not filed within two (2) years of decedent Anthony Booth's death.

18. Plaintiffs' claims are nonetheless timely, however, under the doctrines of equitable tolling and because of delayed accrual under *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946); under which, "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute of limitations does not begin to run until the fraud is discovered."

19. Plaintiff A.K.B., through his Conservator Marlene June, brings this claim pursuant to Arizona's Wrongful Death Act, A.R.S. § 12-611, *et seq.*, on his own behalf, and on behalf of statutory beneficiaries Mary Morgan Bowden (the surviving mother of decedent Anthony Edward Booth), Naisha Ellis and Shahonda Booth (the surviving daughters of decedent Anthony Edward Booth), and Anthony Sherron Booth (the surviving son of decedent Anthony Edward Booth).

20. The basis for equitable tolling and delayed accrual under *Holmberg v. Armbrecht* is as follows:

(a) prior to the decedent's February, 2005 death, the United States was aware that the median barrier design in this case had not been properly crash tested, as required by FHWA rules and regulations;

(b) prior the decedent's February, 2005 death, the United States was aware of numerous lawsuits filed against that the State of Arizona, based on the subject median barrier design;

(c) in these multiple lawsuits, no defendant ever named the United States as a "non-party at fault" or in any other way blamed the United States with respect to the design in question;

(d) in August, 2005, the subject median barrier was subjected to an NCHRP Report 350 crash test;

(e) the barrier failed this crash test;

(f) on September 12, 2005, the FHWA, knowing that the median barrier design at issue had not been crash tested and was not crashworthy, and

knowing it had allowed this barrier to be installed in Arizona in violation of its own rules, issued a Memorandum, signed by FHWA employee John Baxter, indicating that the subject barrier was crashworthy and approved for use on the NHS, when in fact, it was not;

(g) that beginning in early 2007, the United States, citing the "Tuohy" regulations, refused to make its employess available for deposition in civil litigation against the State of Arizona involving the subject median barrier design;

(h) that by refusing to produce its employees for deposition, the United States (through the FHWA, perpetuated the incorrect and untrue notion that the subject design complied with federal rules and regulations;

(i) on April 29, 2009, employees of the United States, Federal Highway Administration, had their depositions taken;

(j) based on their deposition testimony, the Defendant acknowledged, for the first time that the subject barrier was not crashworthy and had been approved for use in Arizona in violation of federal rules, regulations and policies; that based on the above, the statute of limitations on Plaintiffs' claims did not begin to run until April 29, 2009;

(k) in 2002, cable median barrier designs with 6" cable spacings and a top cable at 33" (which includes the design in question), were removed from the AASHTO Roadside Design Guide, in part due to lack of crash testing

(l) prior to April 29, 2009, there was evidence that the State of Arizona, ADOT, misled United States during the design and funding phases of the subject barrier into believing that the subject barrier design was crashworthy

(m) in 2004, ADOT concluded a study at the request of the Arizona Attorney General, showing that the subject design had failed over 100 times since its installation in 2000; assuming a similar failure rate through the present, this would amount to well over 200 failures

(n) under Arizona law, the State of Arizona is legally responsible for the safety of the roadway in question, Interstate 10

(o) in summary, prior to the death of Plaintiffs' decedent, the United States knew that it had approved a non-tested, non-crashworthy barrier for widespread installation in and around Phoenix, Arizona; in violation of its own rules and policies; by 2005, it was aware that this barrier was failing at a high rate and aware of multiple lawsuits against the State of Arizona involving the failure of this barrier and multiple unnecessary deaths and serious injuries; despite knowing that this barrier was untested, non-crashworthy and not in compliance with its own rules, the United States issued a public Memorandum, on Sept. 12, 2005, indicating that the design in question in fact was tested and crashworthy, when in fact, it was not; the public, Plaintiffs, their counsel and others relied on the Defendant's misrepresentations about the crashworthiness of the subject barrier; it was

not until April 29, 2009, when FHWA employees John Baxter and Richard Powers were deposed, that the truth about the subject barrier became known; prior to April, 2009, the Defendant, using the Tuohy regs. as a shield, refused to allow its employees to be deposed, thus shielding discovery of the truth;

A.K.B., through his Conservator Marlene June, Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth timely filed Administrative Form 95s, on or about December 20, 2010, within two years of April 29, 2009;

21. The claims of Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth were likewise tolled until April 29, 2009 at the earliest, making their claim notices and wrongful death claims asserted herein timely.

22. Under ~~both Arizona law and~~ federal law, the concealment of material facts by the Defendant will generally toll the statute of limitations and/or delay accrual of claims ~~*See*, for example *Walk v. Ring*, 202 Ariz. 310, 44 P.3d 990 (2002), *Doe v. Roe*, 191 Ariz. 313, (1998), and *Gust, Rosenfeld & Henderson v. Prudential Ins. Co.*, 182 Ariz. 586 (1995) (Arizona law) and~~ *Diminnie v. United States*, 728 F.2d 301 (6th Cir. 1984), citing *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 3111, 77 L. Ed. 2d 1366 (1983); and *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946)

23. The claims of Mary Morgan Bowden, Naisha Ellis, Shahonda Booth and Anthony Sherron Booth accrued

no earlier than April 29, 2009 and their claim notices were timely filed within two years of accrual, and are thus timely.

24. By letter dated March 18, 2011, the Federal Highway Administration denied all of Plaintiffs' Administrative Claims, vesting this Court with jurisdiction.

25. The discretionary function exception, codified at 28 U.S.C. § 1346(b)(1), does not apply to the acts and omissions at issue in this matter

26. The discretionary function exception does not apply where, as here, the government agency acts in violation of its own mandatory directive. *See*, for example, *Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995), *Kelly v. U.S.*, 241 F.3d 755, 762 (9th Cir. 2001).

27. The discretionary function exception likewise does not apply where, as here, the decisions in question are not "policy" decisions. *Berkovitz v United States*, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

COUNT ONE — NEGLIGENCE

28. The United States, through the FHWA, owed Plaintiff's decedent and all motorists traveling on NHS roadways a duty of due care.

29. The United States, through the FHWA, breached its duty of due care and was negligent by failing to comply with its own policies and/or federal rules/law mandating that any safety device installed on the NHS be crash tested and approved pursuant to NCHRP Report 350.

30. Had a crashworthy, appropriately tested, NCHRP Report 350 compliant barrier been present on February 19, 2005, the death of Plaintiff's decedent would have been prevented.

31. That as a direct result of said negligence, Plaintiff's decedent died, causing Plaintiff's wrongful death damages under A.R.S. § 12-611, *et. seq.*, including but not limited to severe and permanent physical, mental and emotional injuries, for which recovery is permitted under Arizona's wrongful death statute.

COUNT TWO — NEGLIGENCE *PER SE*

32. Plaintiff realleges and incorporates by reference each of the allegations set forth above, as if fully rewritten herein.

33. That the United States, by and through its agency, the FHWA, owed Plaintiff's decedent a duty of due care.

34. That the United States had a federally mandated safety duty, as set forth at 23 C.F.R. Part 625, and Federal Register, Vol. 58, No. 135 (July 18, 1993), page 38293 *et seq.*, to allow only NCHRP Report 350 crash tested and approved devices on NHS roadways.

35. That the United States, through the FHWA, failed to comply with the aforementioned safety rules and regulations and breached duties owed to Plaintiff's decedent and committed negligence *per se*. *Patterson v. Thunder Pass*, 214 Ariz. 435, 438 (App. 2007), *Brannigan v. Raybuck*, 136 Ariz. 513, 517 (1983).

36. Had a crashworthy, appropriately tested, NCHRP Report 350 compliant barrier been present on

February 19, 2005, the death of Plaintiff's decedent would have been prevented.

37. That as a direct result of said negligence *per se*, Plaintiff's decedent died, causing Plaintiff's wrongful death damages under A.R.S. § 12-611, *et. seq.*, including but not limited to severe and permanent physical, mental and emotional injuries.

WHEREFORE, Plaintiff respectfully requests that this Court grant her judgment against Defendant for:

a. Compensatory wrongful death damages in the amount of $1,000,000 per Plaintiff;

b. Costs incurred herein;

c. Such other relief as the Court deems appropriate.

DATED this 12th day of August, 2011.

THE LEADER LAW FIRM

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV-11-00901-PHX-SRB

MARLENE JUNE, CONSERVATOR FOR A.K.B., A MINOR AND SURVIVING SON OF ANTHONY EDWARD BOOTH, IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANTS

[Filed: Aug. 12, 2011]

PLAINTIFFS' RESPONSE AND OPPOSITION, MOTION TO DISMISS

Plaintiffs respond to and oppose the Defendant's Motion to Dismiss for lack of subject matter jurisdiction.

The Court Must Deny the Motion to Dismiss Because Federal Statutes of Limitations Are Not Jurisdictional

The sole basis for the Defendant's motion to dismiss is alleged lack of jurisdiction. The Government moves to dismiss under Rule 12(b)(1).

The Government contends that 28 U.S.C. § 2401, the FTCA statute of limitations is jurisdictional. 28 U.S.C. § 2401 provides:

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

As discussed below, federal limitation statute are not jurisdictional, under binding U.S. Supreme Court precedent, meaning the Court must deny the instant Motion to Dismiss.

Federal Statutes of Limitation Are Not Jurisdictional Bars

Under *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 93-96 (1990), binding U.S. Supreme Court precedent, federal statutes of limitation, like 28 U.S.C. § 2401, are not jurisdictional bars.

The operative language from *Irwin* is at pages 95-96:

> Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a

> principle is likely to be a realistic assessment of legislative intent, as well as a practically useful principle of interpretation. ***We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.*** Congress, of course, may provide otherwise if it wishes to do so. [emphasis added]

Irwin, 498 U.S. at 95-96.

In *Santos v. U.S.*, 559 F.3d 189, 194 (3rd Cir. 2009), the Third Circuit explained that under *Irwin*, 28 U.S.C. § 2401 is not jurisdictional:

> At one time we held that the FTCA's statute of limitations was jurisdictional. *See, e.g., Bradley v. United States*, 856 F.2d 575, 577-78 (3d Cir. 1988), *vacated on other grounds*, 490 U.S. 1002, 109 S. Ct. 1634, 104 L. Ed. 2d 150 (1989).
>
> **But the Supreme Court subsequently held that federal statutes of limitations are not jurisdictional and that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."** *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 93-96, 111 S. Ct. 453, 456-57, 112 L. Ed. 2d 435 (1990). [emphasis added]

In *Santos*, the plaintiff brought suit under the Federal Tort Claims Act after the statute of limitations had expired. The trial court granted summary judgment. The Third Circuit Court of Appeals reversed, applying the doctrine of "equitable tolling", and deemed Santos' claim timely, even though it was filed after the statute of

limitations in 28 U.S.C. § 2401 had expired. Under *Irwin* and *Santos*, **"federal statutes of limitations are not jurisdictional"**. Because federal statutes of limitations are not jurisdictional, the instant Motion to Dismiss must be denied.

The D.C. Court of Appeals, in *Norman v. U.S.*, 467 F.3d 773, 775 (D.C. Cir. 2006), likewise held that under *Irwin*, federal statutes of limitations are not jurisdictional:

> In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 93-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), the Supreme Court held that federal statutes of limitations are not jurisdictional . . .

It is abundantly clear under *Irwin*, and confirmed by cases like *Santos* and *Norman*, that "federal statutes of limitations are not jurisdictional".

In *Alvarez-Machain v. United States*, 107 F.3d 696, 700 (9th Cir. 1996), an FTCA case, the Ninth Circuit cited *Irwin* and stated:

> Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 95-95 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply.
>
> Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

Under *Alvarez-Machain*, equitable tolling is available for FTCA claims.

As the Ninth Circuit explained in *Rouse v. U.S. Dept. of State*, 567 F.3d 408, 415-16 (9th Cir. 2009), if the defenses of waiver, estoppel, and equitable tolling apply, the statute in question is non-jurisdictional:

> Before proceeding further, we must decide whether § 552a(g)(5) operates as a statute of limitations or as a jurisdictional bar. If it is the former, the traditional defenses of "waiver, estoppel, and equitable tolling" apply. *United States v. Locke*, 471 U.S. 84, 94 n.10, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985). If it is the latter, such defenses are inapplicable, and we lack subject matter jurisdiction over the case entirely. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982).

Applying *Alvarez-Machain* and *Rouse*, because the doctrine of equitable tolling applies to FTCA claims, the FTCA statute of limitations is non-jurisdictional.

Further, in *Aloe Vera of America v. U.S.*, 574 F.3d 1176, 770 (9th Cir. 2009), the court explicitly recognized, under *Irwin*, that limitation periods for suing the United States are not jurisdictional:

> That holding is in accord with other Ninth Circuit opinions, issued after the Supreme Court's decision in *Irwin*, in which we recognized that ***limitations periods for suing the federal government are not strictly jurisdictional***. See *Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995), vacated, 117 S. Ct. 1103 (1997), reinstated, 113 F.3d 167, 168 (9th Cir. 1997); *Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir. 1994); *Johnson v. Shalala*, 2 F.3d 918, 923 (9th Cir. 1993).

> In *Washington*, we said that "[i]n [*Irwin*], the Supreme Court held that federal statutory time limitations on suits against the government are not jurisdictional in nature." *Washington*, 10 F.3d at 1437. And in *Fadem*, we relied on our interpretation in *Washington* to hold that federal statutes of limitations are not jurisdictional. See *Fadem*, 52 F.3d at 206. We further held that earlier statements that statutes of limitations are jurisdictional in nature "have no continuing validity after the Court's decision in Irwin." Id. [emphasis added]

Thus, under *Alvarez-Machain*, *Rouse*, *Aloe Vera*, *Fadem*, *Washington* and *Johnson*, limitation periods for suing the United States are not jurisdictional.

The cases cited by the Government do not establish that 28 U.S.C. § 2401 is jurisdictional. To the contrary, the authorities cited herein by Plaintiffs conclusively establish that the applicable limitation periods for suing the United States are not jurisdictional, and that "waiver, estoppel, and equitable tolling" apply.

Interestingly, the Government cites *Irwin* in its motion (at page 6, lines 9-10), and appears to acknowledge that equitable tolling applies. *See* Motion to Dismiss, at page 6, paragraph one:

> "Plaintiff has the burden of establishing that the statute of limitations that has run should be equitably tolled. *Cooper v. Bell*, 628 F.2d 1208, 1214 (9th Cir. 1980). Equitable tolling focuses primarily on the plaintiff's excusable ignorance of the limitations period. *Lehman v. United States*, 154 F.3d 1010, 1019 (9th Cir. 1988). For equitable tolling to apply, a

> plaintiff must show that an affirmative misrepresentation or affirmative concealment of a material fact by the government somehow prevented or made impossible the filing of a timely complaint, and that the plaintiff neither knew nor reasonably should have known the material facts. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)."

Under *Rouse*, if equitable tolling applies—and it does—28 U.S.C. § 2401 is by definition non-jurisdictional. Thus, the Government's motion to dismiss for lack of jurisdiction must be denied.

Given that equitable tolling applies, and under *Irwin*, 28 U.S.C. § 2401 is non-jurisdictional and the Motion to Dismiss must be denied. The sole basis for the Government's motion is alleged lack of subject matter jurisdiction.

Plaintiffs call the Court's attention to *Marley v. U.S.*, 567 F.3d 1030 (9th Cir. 2009), a case not cited by the Defendant. In *Marley*, the plaintiff timely served a Form 95, which the government denied in October, 2004. The plaintiff then failed to file suit within six (6) months of the agency denial. *Marley* held that 28 U.S.C. § 2401(b)'s requirement of filing suit within six (6) months of the agency denial was jurisdictional in nature and that the doctrine of equitable tolling did not apply. 567 F.3d at 1038. *Marley* is potentially contrary to Plaintiffs' position.

Plaintiffs respond to *Marley* as follows. First, *Marley* is not an *en banc* opinion. Second, it is in direct conflict with *Irwin*, which holds that federal statutes of limitations are not jurisdictional. Third, *Marley* is in

conflict with several other Ninth Circuit opinions holding under *Irwin* that federal statutes of limitations are not jurisdictional. Fourth, *Marley* is distinguishable factually because in the instant case, Plaintiffs complied with 28 U.S.C. § 2401's requirement that suit be filed within six (6) months of the agency denial. Plaintiffs submit it would be improper for this Court to rely on *Marley*.

The Court Must Take the Allegations in Plaintiffs' Complaint As True

The Government argues under *Thornhill Pub. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733-35 (9th Cir. 1979), that the Court need not take as true Plaintiffs' complaint allegations relating to jurisdiction as true. As discussed above, however, this Court has subject matter jurisdiction because federal statutes of limitations are not jurisdictional.

It is well established that in ruling on a motion to dismiss, district courts must take as true complaint allegations not relating to jurisdiction. *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1094 (9th Cir. 2010) ("Plaintiffs have alleged facts, which must be taken as true for purposes of a motion to dismiss . . . "). *See also Blankenship v. McDonald*, 176 F.3d 1192, 1194 (9th Cir. 1999) ("The allegations in the complaint are considered true for purposes of the motion to dismiss . . . ").

Plaintiffs have requested leave to file an amended complaint. Even if that motion is denied, the allegations in Plaintiffs' original complaint, taken as true, mandate denial of the motion to dismiss.

Taking Plaintiffs' Allegations As True, the Court Must Deny the Motion

Paragraph 20 of Plaintiffs' complaint states that all Form 95s were timely filed on or about December 20, 2010. For purposes of a motion to dismiss, the Court must take this allegation as true.

Paragraph 24 states that the agency denied Plaintiffs' claim(s) on March 18, 2011. For purposes of a motion to dismiss, the Court must take this allegation as true.

Plaintiffs filed their District Court Complaint May 5, 2011, well within six (6) months of the agency denial, as required by § 2401(b).

Taking as true Plaintiffs Complaint allegations, the Court must conclude: 1) Plaintiffs' Form 95s were timely and, 2) that Plaintiffs timely filed their District Court complaint within six (6) months of the agency's denial.

Under 28 U.S.C. § 2401(a), Tolling Based on Disability Applies to "All" Civil Cases Filed Against the United States

When the terms of a statute are unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances." *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 66 L. Ed. 2d 633 (1981), cited with approval in *CSX Transp v. Georgia State Brd of Equalization*, 552 U.S. 9 (2007).

28 U.S.C. § 2401(a) provides:

> (a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is

> filed within six years after the right of action first accrues. *The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.* [emphasis added]

Under § 2401(a), "every civil action" may be filed within three (3) years of a legal disability ceasing. Minority is a well recognized legal disability. Under § 2401(a), Plaintiff AKB should have three years from the date he turns 18 to serve his Form 95 and file suit.

Plaintiffs acknowledge, that there is contrary (but dated) Ninth Circuit authority on this issue. See *United States v. Glenn*, 231 F.2d 884 (9th Cir.), *cert. denied*, 352 U.S. 926, 77 S. Ct. 223, 1 L. Ed. 2d 161 (1956) (28 U.S.C. § 2401(a) does not apply to Federal Tort Claims Act actions). The *Glenn* court, however, did not apply the plain meaning rule of statutory construction.

28 U.S.C. § 2401(a) is not at odds with § 2401(b). In § 2401(b), Congress could have, but did not specifically exempt FTCA cases from § 2401(a)'s purview.

Plaintiffs ask this Court to apply the *Rubin* rule of statutory construction and hold, under § 2401(a), that AKB's claims are tolled until his minor disability ceases.

Conclusion

The Government moves to dismiss, claiming that 28 U.S.C. § 2401(b) is jurisdictional, that Plaintiffs did not strictly comply with that statute, and that this Court therefore lacks jurisdiction. *Irwin* holds, however, that federal statutes of limitations are not jurisdictional. The

doctrines of waiver, estoppel, and equitable tolling apply to FTCA cases and this Court has jurisdiction.

Because the Court has jurisdiction, it must take the allegations in Plaintiffs' complaint as true in ruling on the Motion to Dismiss. Taking as true Plaintiffs Complaint allegations, the Court must conclude Plaintiffs' Form 95s were served (applying equitable tolling and the accrual rule of *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946)). The Court must also find that Plaintiffs timely filed their District Court complaint, within six (6) months of the agency's denial.

Finally, this Court should apply the *Rubin* rule of statutory construction and hold, under § 2401(a), that AKB's claims are tolled until his minor disability ceases.

DATED this 12th day of August, 2011.

THE LEADER LAW FIRM

/s/ JOHN P. LEADER
JOHN P. LEADER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17776
D.C. No. 2:11-cv-00901-SRB
District of Arizona, Phoenix

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed: Oct. 3, 2013]

ORDER

Oral argument scheduled for October 16, 2013, is VACATED. Submission of this appeal is deferred pending the resolution of *Wong v. Beebe*, 10-36136 (en banc).

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Samantha Miller
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17776
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MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed: Oct. 15, 2013]

ORDER

Submission of this appeal was deferred pending resolution of *Wong v. Beebe*, No. 10-36136 (en banc). *Wong* was decided on October 8, 2013. Therefore, within fourteen (14) days of the date of this order, the parties will file simultaneous briefs addressing the effect, if any, of *Wong* on this appeal. The briefs shall be no longer than 15 pages or 7,000 words.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Samantha Miller
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17776
D.C. No. 2:11-cv-00901-SRB
District of Arizona, Phoenix

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed: Oct. 24, 2013]

ORDER

Before: THOMAS and MCKEOWN, Circuit Judges, and BENNETT, District Judge.*

The Court still wishes the views of the parties on the effect, if any, of *Wong v. Beebe*, No. 10-36136 (en banc) on this appeal, and is not inclined to defer sub-

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* The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.

mission pending the Solicitor General's decision as to whether to file a petition for a writ of certiorari in *Wong*. Therefore, the joint motion to stay the briefing schedule is DENIED. However, the Court will reset the briefing schedule. The simultaenous briefs are now due within fourteen (14) days of the date of this order. The briefs shall be no longer than 15 pages or 7,000 words.

No. 11-17776

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

SUPPLEMENTAL BRIEF FOR APPELLEE

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Legislative Materials:

H.R. 9285, § 202, 70th Cong. (1928) ..... [17]
H.R. Rep. No. 81-276 (1949) ..... [9]
S. 1912 as amended in committee, H.R. Rep. No. 69-667, § 202, 69th Cong. (1926) ..... [17]

S. Rep. No. 89-1327 (1966) ..... [13, 19]

Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong. 38 (1940) ..... [18]

Tort Claims: Hearings on H.R.5373 and H.R.6463 before the House Comm. On the Judiciary, 77th Cong., 2d Sess., 24 (1942) ..... [9]

Other Authorities:

14 Frumer & Friedman, *Personal Injury Actions, Defenses, and Damages* § 61.04 (Matthew Bender, Rev. Ed.) ..... [10]

Colella & Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174 (2000) ..... [17]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-17776

MARLENE JUNE, CONSERVATOR FOR MINOR AND SURVIVING SON OF DECEASED IN HIS OWN RIGHT AND ON BEHALF OF ALL STATUTORY BENEFICIARIES CONSERVATOR FOR A.K.B. DECEASED, ANTHONY EDWARD BOOTH, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

SUPPLEMENTAL BRIEF FOR APPELLEE

This Court has directed the parties to submit supplemental briefs "addressing the effect, if any" of *Wong* v. *Beebe*,__ F.3d __, 2013 WL 5539621 (9th Cir. Oct. 9, 2013) (en banc), "on this appeal." *Wong* addressed the Federal Tort Claims Act's six-month deadline for filing suit once the government has issued an administrative decision.[1] *Wong* did not address the two-year deadline for initiating a tort action against the United States, and it did not overrule prior holdings concerning the two-year time bar.

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[1] The Solicitor General has not yet determined whether to seek certiorari in *Wong*.

The different timing provisions were passed against different backgrounds and serve different functions.

If the Court were to conclude, however, that *Wong*'s jurisdictional holding with regard to the six-month requirement for filing suit also encompasses the two-year period for filing an administrative claim, the appropriate disposition would be to vacate the district court's decision that the two-year limitations period is jurisdictional and remand for the district court to consider whether, if the two-year period is non-jurisdictional, it is subject to equitable tolling, and whether plaintiff's alleged reasons for missing the two-year deadline would warrant equitable tolling.

BACKGROUND

1. In 1946, following "nearly thirty years of congressional consideration," *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953), involving "drafting and redrafting, amendment and counter-amendment" of many legislative proposals, *United States* v. *Spelar*, 338 U.S. 217, 219-220 (1949), Congress passed the Federal Tort Claims Act (FTCA) to create a limited waiver of the government's sovereign immunity, thus granting jurisdiction to district courts to hear certain tort claims against the government. Congress has amended the Act nearly thirty times.

As relevant here, the initial Act contained a one-year limitations period, requiring that any claim "shall be forever barred, unless within one year after such claim accrued," the claim was presented to the relevant federal agency (if the claim was for less than $1,000), or suit was filed. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 420, 60 Stat. 812, 845. Following the 1948

recodification, Congress increased the period from one to two years. Pub. L. No. 81-55, ch. 92 § 1, 63 Stat. 62 (1949). In 1966, Congress further amended the Act, requiring that before the expiration of the two year period, all claims must be filed with the relevant federal agency. Pub. L. No. 89-506, § 7, 80 Stat. 306, 307 (1966). Following a denial by the agency, any suit must be brought within six months. *Ibid.*

2. On February 15, 2005, Anthony Edward Booth died in a car accident when the car he was driving crossed the road into oncoming traffic. SER 3. Plaintiff is a survivor and beneficiary of Mr. Booth. SER 4.

In 2006, plaintiff filed a wrongful death action against a contractor and against the State of Arizona for installing and maintaining a median barrier that failed to stop Booth's car from crossing into oncoming traffic. See Dkt. 10-2 (Complaint, *Morgan* v. *Arizona*, No. CV2006-002287 (AZ. Sup. Ct.)).

Nearly six years after the accident, on December 20, 2010, plaintiff filed an administrative complaint under the FTCA. SER 3, 4. Plaintiff acknowledged that he had long-since missed the two-year cutoff for filing a claim but urged that under state law, the time period should be tolled during the period that the plaintiff was a minor. SER 4. He additionally alleged that he was suing on behalf of other beneficiaries of Booth (who were not named as plaintiffs), and that their claims did not accrue until 2009 and/or were tolled due to "concealment of material facts." SER 4-5.

In response to the government's motion to dismiss, plaintiff moved to amend his complaint and lodged an

amended complaint. Dkt. 14. In his amended complaint, plaintiff alleged that in 2007, the federal government declined to make Federal Highway Administration (FHWA) employees available for depositions in plaintiff's lawsuit against Arizona, and that he therefore learned only in 2009, during depositions of other FHWA employees that the FHWA had concerns about the median barriers. Dkt. 14 at 5-6. Therefore, plaintiff claimed, "under the doctrines of equitable tolling and because of delayed accrual" his claims were timely. Dkt. 14, at 4.

3. The district court dismissed the case for lack of jurisdiction and denied plaintiff's motion to amend as moot. ER 3:5-7.[2] The court first held that plaintiff's claim accrued on February 19, 2005. The court observed that "[g]enerally, 'ignorance of the involvement of government employees is irrelevant to accrual of a federal tort claim' and 'accrual does not await a plaintiff's awareness . . . of the government's negligence.'" ER 3:3 (quoting *Hensley* v. *United States*, 531 F.3d 1052, 1056 (9th Cir. 2008)). The court found that "[n]one of the facts relevant to the accrual of Plaintiff's claims were unknown to Plaintiff or concealed by the United States." *Ibid.* And the court noted two decisions in which this Court held that claims were time barred notwithstanding plaintiffs' ignorance of involvement by the federal government. ER 3:3-4 (citing *Hensley*, 531 F.3d at 1057 and *Dyniewicz* v. *United States*, 742 F.2d 484, 487 (9th Cir. 1984)).

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[2] Appellant's Excerpts of Record contains tabs rather than consecutively numbered pages. This brief cites the ER with references to <tab number> : <document page number>.

The court next held that even if plaintiff's allegations of concealment of federal involvement could give rise to equitable tolling, the FTCA's two-year limitations period is not subject to tolling because it is jurisdictional. ER 3:4-5. The court reasoned that the two-year time bar is "a condition of the United States' waiver of sovereign immunity, and courts cannot 'extend the waiver beyond that which Congress intended.'" ER3:4 (quoting *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979) and citing *Marley* v. *United States*, 567 F.3d 1030, 1037-38 (9th Cir. 2009)).

4. As relevant here, on appeal plaintiff urged that the district court erred by holding that the FTCA's two-year time bar is jurisdictional. Pl. Br. 15-20. In addition, in three sentences and without citation, plaintiff asserted that the proposition that the two-year time bar "is not 'jurisdictional'[] mean[s] [that] equitable tolling can apply." Pl. Br. 20. Plaintiff did not explain his assumption that equitable tolling is available with regard to any statute that is not jurisdictional.

DISCUSSION

Wong v. *Beebe*, __ F.3d __, 2013 WL 5539621 (9th Cir. Oct. 9, 2013) (en banc), addressed the Federal Tort Claims Act's six-month deadline for filing suit once the government has issued an administrative decision. That provision is not at issue in this appeal. *Wong* did not address the two-year deadline for initiating a tort action against the United States. The two-year time bar was passed against a different background and serves different functions than the six-month provision. *Wong* did not address the historical, contextual, and structural features that are unique to the two-year time bar. Nor

did it overrule prior holdings concerning the two-year limitations period.

As this Court reiterated in *Wong* v. *Beebe*, __F.3d __, 2013 WL 5539621 (9th Cir. Oct. 9, 2013) (en banc), when Congress establishes a statutory time period, that time period may be extended only if two conditions are satisfied. First, the time period cannot be jurisdictional, *i.e.*., it cannot concern the court's authority to hear the case or the government's waiver of sovereign immunity. *Id.* at *3. Second, if the time period is not jurisdictional, a court must interpret the statute in question to determine whether Congress intended that tolling be available. *Id.* at *6, *14. Both of these inquiries are highly contextual.

A. In determining whether a time bar is jurisdictional, the ultimate question is "whether Congress intended a particular provision to rank as jurisdictional." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). To answer that question, a court must look to the language, structure, purpose, and history of that provision, and must also "consider [its] 'context, including th[e] [Supreme] Court's interpretations of similar provisions in many years past.'" *Ibid.* (quoting *Reed Elsevier, Inc.* v. *Muchnick*, 559 U. S. 154, 168 (2010)); *see also Dolan* v. *United States*, 130 S. Ct. 2533, 2538 (2010); *Zipes* v. *TWA*, 455 U.S. 385, 393 (1982).

1. As the Supreme Court has explained, in interpreting the FTCA's two-year time bar, the FTCA "waives the immunity of the United States" and "in construing the statute of limitations, which is a condition of that waiver" courts "should not take it upon [them]selves to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-18 (1979). Accord-

ingly, this Court has previously stated that the FTCA's two-year time bar is "jurisdictional." *Dyniewicz* v. *United States*, 742 F.2d 484, 485 (9th Cir. 1984) (Kennedy, J.); *Augustine* v. *United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Mann* v. *United States*, 399 F.2d 672, 673 (9th Cir. 1968); *see also Blain* v. *United States*, 552 F.2d 289, 291 (9th Cir. 1977) (requirement of filing administrative claim "is jurisdictional in nature and may not be waived" and "[t]hus, failure to comply within the required time period results in the claim's being forever barred"); *Humphreys* v. *United States*, 272 F.2d 411, 412 (9th Cir. 1959) ("[I]n a suit against the sovereign, there must be a waiver of immunity; but no waiver exists under 28 U.S.C. § 1346 once the two-year period of limitations has run. Thus, after the two-year period the District Court has no jurisdiction over the action.").

This precedent is binding. *See, e.g., In re: Amy*, 714 F.3d 1165, 1167 (9th Cir. 2013) (per curiam) (prior rulings are "binding on this court in the absence of intervening higher authority that is clearly irreconcilable"). As discussed below, nothing in *Wong* is "clearly irreconcilable" with this Court's prior holdings that the two-year time bar is jurisdictional. *Wong* concerned a different time limit passed against a different background that serves a different function. When the Court in *Wong* stated that "§ 2401(b)"—the section containing both time periods—"is nonjurisdictional" (2013 WL 5539621 at *5, *6), it could not have been addressing the two-year time bar, because that provision was not at issue. *See Barapind* v. *Enomoto*, 400 F.3d 744, 750-51 (9th Cir. 2005) (en banc) (per curiam).

2. Even if this Court had not already established that the two-year time bar is jurisdictional, the history and context of that provision, as distinct from the six-month filing deadline, demonstrate that "Congress intended [that] particular provision to rank as jurisdictional." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824.

Following "nearly thirty years of congressional consideration," *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953), Congress passed the FTCA in 1946 to create a limited waiver of the government's sovereign immunity, thus granting jurisdiction to district courts to hear certain tort claims against the government. The initial Act contained a one-year limitations period, requiring that any claim "shall be forever barred, unless within one year after such claim accrued," the claim was presented to the relevant federal agency (if the claim was for less than $1,000), or suit was filed. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 420, 60 Stat. 812, 845. Following the 1948 recodification, Congress increased the period from one to two years. Pub. L. No. 81-55, ch. 92 § 1, 63 Stat. 62 (1949).

When interpreting a statute, a court must "take into account [the] contemporary legal context" of the statute's enactment. *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 698-699 (1979). When Congress created the two-year time bar, it was generally understood that time periods in which suits could be brought against the government were limits on the waiver of sovereign immunity and therefore "jurisdictional." *See, e.g., Munro* v. *United States*, 303 U.S. 36, 41 (1938) (World War Veterans Act); *Carpenter* v. *United States*, 56 F.2d 828, 829 (2d Cir. 1932) (Tucker Act). Indeed, in passing the FTCA, Congress

was seeking to fill a gap left by the Tucker Act, which allowed for claims against the United States not founded in tort, *see, e.g.*, *Dalehite*, 346 U.S. at 25 n.10; *Tort Claims: Hearings on H.R.5373 and H.R.6463 before the House Comm. On the Judiciary*, 77th Cong., 2d Sess., 24 (1942), and which has consistently been held to constitute a jurisdictional, time-limited waiver of sovereign immunity, *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-35 (2008) (reviewing history). "[T]h[e] [Supreme] Court's interpretations" of these "similar provisions" strongly suggest that "Congress intended" the FTCA's two-year time bar "to rank as jurisdictional." *See Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824 (interpreting the Tucker Act).

There is no indication that Congress intended for the FTCA's two-year time limit to be any different. To the contrary, when Congress enlarged the time limit from one year to two years, the Committee Reports explained that Congress was enlarging the time period to avoid possibly "unfair" scenarios, such as a next of kin not being timely notified of a death or injuries worsening after one year had passed—the type of "unfairness" that in other contexts might be thought to give rise to equitable tolling. *See* H.R. Rep. No. 81-276, at 3-4 (1949).

Thus, as courts began interpreting the FTCA, they regularly recognized that the two-year time bar was not an ordinary statute of limitations but was instead was "jurisdictional," *i.e.*, "a statute of creation and a condition or qualification of the right rather than a statute of limitations and merely a procedural requirement, so that disabilities, such as infancy or insanity, are not read into the Act to toll its limitations period" and failure to comply

"may be raised on motion to dismiss even though it was not pleaded in the answer, and the defense cannot be waived by stipulation or otherwise." 14 Frumer & Friedman, *Personal Injury Actions, Defenses, and Damages* § 61.04 (Matthew Bender, Rev. Ed.); *see, e.g., Foote* v. *Pub. Housing Comm'r*, 107 F. Supp. 270, 272-73 (W.D. Mich. 1952); *Simon* v. *United States*, 244 F.2d 703 (5th Cir. 1957); *Lomax* v. *United States*, 155 F. Supp. 354, 357-58 (E.D. Pa. 1957); *Mann* v. *United States*, 399 F.2d 672 (9th Cir. 1968); *Carignan* v. *United States*, 48 F.R.D. 323, 326-27 (D. Mass. 1969); *Binn* v. *United States*, 389 F. Supp. 988, 991 (E.D. Wis. 1975). Indeed, in a case construing the two-year limitations period, the Supreme Court described the statute of limitations as "a condition of th[e] [Act's] waiver" of sovereign immunity. *Kubrick*, 444 U.S. at 117.

During the subsequent decades, Congress amended the FTCA nearly 30 times. Yet Congress never rejected the longstanding interpretation of the two-year time bar as jurisdictional. That Congress has periodically recodified the relevant statutory provision, and has refined its language in other respects without evincing any intent to alter its jurisdictional character, provides a further reason to adhere to this Court's prior construction of the law. *Compare, e.g., Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 176, 179-180 (2005); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Cannon*, 441 U.S. at 696-699; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). *See Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-28 (relying on the fact that Congress amended a statute six times and left untouched a uniform judicial and administrative interpretation); *cf. CFTC* v.

Schor, 478 U.S. 833, 846 (1986) (acquiescence to administrative interpretation); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (same).

The only substantial change that Congress made to the two-year time bar was in 1966, when it required that all claims be presented to the relevant federal agency within the two-year period. *See McNeil* v. *United States*, 508 U.S. 106, 112 n.7 (1993) (describing history of the 1966 amendment). There is no indication in either the text or legislative history of the 1966 Act that Congress intended to transform the jurisdictional limitation on the waiver of sovereign immunity into a non-jurisdictional, claims processing rule.

To the contrary, Congress' decision to tie the two-year time bar to a requirement of presenting an administrative claim underscores in a number of ways that the two-year time bar is jurisdictional. First, the requirement of presenting an administrative claim is incontrovertibly jurisdictional. *See, e.g., Meridian Int'l Logistics* v. *United States*, 939 F.2d 740, 743 (9th Cir. 1991). As currently codified, the FTCA's waiver of sovereign immunity, 28 U.S.C. § 1346(b), expressly states that the waiver is "[s]ubject to the provisions of chapter 171," which, in turn, includes 28 U.S.C. § 2675(a), imposing the requirement of presenting the claim to the relevant agency. The requirement to file a claim within two years is part and parcel of the jurisdictional requirement to file the administrative claim. *See Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1205 (2011) (reading a particular procedural requirement in the context of the overall statutory scheme may provide the "most telling" evidence of whether Congress intended that requirement to be jurisdictional).

Indeed, in *Blain* v. *United States*, this Court explained that "[t]he government moved to dismiss [the case] on the ground that plaintiffs had failed to meet the requirements of section 2675 by failing to file a claim within the required two-year period." 552 F.2d at 291. This Court held that "[t]he claim requirement of section 2675 is jurisdictional in nature and may not be waived" and "[t]hus, failure to comply within the required time period results in the claim's being forever barred." *Ibid.*

Second, by tying the two-year time limit to the requirement of submitting an administrative claim, Congress used the two-year time bar "to achieve a broader system-related goal[,]" "facilitating the administration of claims"—a hallmark of jurisdictional time periods. *John R. Sand & Gravel Co.*, 552 U.S. at 133. The purpose of the required administrative claim procedure is to ensure efficient administrative review by those with "the best information" about the activity at issue, who can therefore sort meritorious from meritless claims and make appropriate settlement decisions, preventing an unnecessary burden on the court system. *McNeil*, 508 U.S. at 112 n.7 (quoting S. Rep. No. 89-1327, at 3 (1966)); *see also Brady* v. *United States*, 211 F.3d 499, 502-503 (9th Cir. 2000). Congress' decision to require the filing of an administrative claim by the end of the two-year period further underscores Congress' intent that the two-year bar is jurisdictional insofar as it even more expressly used the two-year period "to achieve a broader system-related goal, such as facilitating the administration of claims," *John R. Sand & Gravel Co.*, 552 U.S. at 133. The "interest in assuring that agency officials have a full opportunity to investigate and consult internally with regard to

claims for compensation," *Wong*, 2013 WL 5539621 at *13, would be greatly undermined if someone could file an administrative claim years after an event accrued when it was no longer possible "to investigate and consult internally" with employees who had since left. *See ibid; see also Brockamp* v. *United States*, 519 U.S. 347, 352-53 (1997) (reasoning that "[t]he nature and potential magnitude of the administrative problem" of an agency processing late claims "tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods.").

In 1988, Congress added a further provision, 28 U.S.C. § 2679(d)(5), providing that when certain FTCA suits are "dismissed for failure first to present a[n] [administrative] claim pursuant to [28 U.S.C. § 2675(a)]," a dismissal for lack of jurisdiction, the "claim shall be deemed to be timely presented" under the two-year time limit if the suit was otherwise timely and the plaintiff then files an administrative claim within 60 days of dismissal. Congress thus again directly tied the jurisdictional requirement of filing an administrative claim to the two-year time period for doing so. And Congress provided that when a suit is dismissed for lack of jurisdiction, then under certain circumstances, the administrative claim "shall be deemed" to have complied with the two-year limit. This amendment assumes that compliance with the two-year requirement for presenting an administrative clam is part of the jurisdictional requirement of presenting an administrative claim. *See West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (statutory provision should be "construe[d] []to contain that permissible meaning which fits most logically and comfortably into the body of

both previously and subsequently enacted law"); *see also Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228 (2010) (later enacted statute "clarif[ies] the understanding" of earlier enacted statute).

B. Were the Court to conclude that the two-year time bar is not jurisdictional, it does not follow that the time period would be subject to equitable tolling. *Wong*, 2013 WL 5539621, at *6. Instead, the question would be whether Congress intended for equitable tolling to apply to the two-year time bar, *see id.* at *14, a question not answered by *Wong*.

1. If the Court concludes that the two-year time bar is not jurisdictional, the appropriate disposition is to vacate and remand for the district court to decide, in the first instance, "whether 'there [is] good reason to believe that Congress did not want the equitable tolling doctrine to apply'" to the two-year time bar, *Wong*, 2013 WL 5539621, at *6. (alteration in original). As noted, the district court held only that the two-year time bar is jurisdictional. ER 3:4-5. The court did not pass upon the question whether, assuming that the two-year time limit is non-jurisdictional, Congress intended for equitable tolling to apply. Moreover, plaintiff did not properly raise that latter issue on appeal. Instead, after arguing that the district court erred by holding that the two-year time limit is jurisdictional, Pl. Br. 15-20, plaintiff merely asserted (mistakenly) that the proposition that the two-year time bar "is not 'jurisdictional'[] mean[s] [that] equitable tolling can apply." Pl. Br. 20. As this Court noted in *Wong*, however, the fact that a time period is not jurisdictional does not "mean" that tolling applies but rather requires an additional inquiry. 2013 WL 5539621, at *6,

*14. That issue should be decided in the first instance by the district court with sequential briefing.

2. Were the Court to address that issue, however, it should conclude that the two-year period is not subject to equitable tolling. When interpreting a non-jurisdictional statute of limitations, in order to "more accurately reflect Congress' likely meaning," courts ordinarily begin with "a '*rebuttable* presumption' of equitable tolling." *John R. Sand & Gravel Co.*, 552 U.S. at 137. That "presumption," however "is not conclusive" and is rebutted "by demonstrating Congress' intent to the contrary." *Id.* at 137-38. In determining Congress' intent, courts must look to the text, history, purpose, and prior interpretations of the particular time period at issue. See *id.* at 137-138, *Brockamp*, 519 U.S. at 350-54.

As an initial matter, there is a question whether any presumption in favor of equitable tolling applies to the FTCA's requirement that within two years, a plaintiff file an administrative claim with the relevant federal agency. The ordinary "rebuttable presumption" is meant to "reflect Congress' likely meaning." *John R. Sand & Gravel Co.*, 552 U.S. at 137. The presumption, however, "generally involve[s] time limits for filing suit in federal court," and the Supreme Court has noted that the presumption has never applied to certain deadlines for filings before agencies. *Auburn*, 133 S. Ct. at 827; *see also ibid.* (noting that in *Brockamp*, the Court "assum[ed], *arguendo*" that the rebuttable "presumption applied to time limit for filing an administrative claim for a tax refund" but "conclude[d] based on statutory text, structure, and purpose that there was 'good reason to believe that Congress did not want the equitable tolling doctrine to apply'"). The

two-year time bar, unlike the six-month limitations period, is a deadline for filing administrative monetary claims with government agencies.

In any event, the evidence strongly suggests that Congress did not intend that the two-year time bar would be equitably tolled. As noted, when that time limit was first created in 1946, it was passed against the background assumption that limitations period were not subject to equitable tolling. *Compare Holland* v. *Florida*, 130 S. Ct. 2549, 2561 (2010) (presumption of equitable tolling stronger for statutes passed after *Irwin*). The drafting history demonstrates that Congress assumed that equitable tolling would not apply. *See supra* pp. 8-11.

Moreover, the drafting history shows that Congress contemplated adding specific tolling provisions, and ultimately chose not to do so. During the "nearly thirty years of congressional consideration," of the FTCA, *Dalehite*, 346 U.S. at 24, involving "drafting and redrafting, amendment and counter-amendment" of many legislative proposals, *United States* v. *Spelar*, 338 U.S. 217, 219-220 (1949), Congress included equitable tolling provisions in nine of the thirty-one bills proposed but each time omitted equitable tolling from the final statute. *See generally* Colella & Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 220-228 & n.121 (2000); *see, e.g.*, S. 1912 as amended in committee, H.R. Rep. No. 69-667, § 202, 69th Cong. (1926); H.R. 9285, § 202, 70th Cong. (1928). Had Congress believed that equitable tolling would be available, these specific tolling provisions would have been unnec-

essary. And as the Supreme Court has explained, in light of the FTCA's unusual drafting history, its provisions should be understood to "reflect[] a deliberate choice, rather than an inadvertent omission" of material proposed to Congress, but not adopted. *United States* v. *Muniz*, 374 U.S. 150, 155-56 (1963); *see also Spelar*, 338 U.S at 219-21. Indeed, in ultimately adopting a time period without any tolling provision, Judge Alexander Holtzoff, acting as a special counsel to the Attorney General, testified that the one-year period "is not unfair to the claimant, because the lawyer of the claimant should be able to bring this suit within 1 year after the cause of action has accrued" and "[i]f unusual cases of hardship arise, the claimant may still have recourse to a private bill." *Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong. 38 (1940). In light of Judge Holtzoff's role in the drafting and the importance of these debates, the Supreme Court has repeatedly relied on such discussions.[3]

Congress made another deliberate choice that confirms the absence of any intent to make tolling available. Rather than triggering the two-year time bar to file a tort claim with the tort itself, Congress provided that the time period runs from the time that the "claim *accrues*," 28 U.S.C. § 2401(b) (emphasis added). By pegging the two-year time limit to the time that the claim "accrues," Congress provided that "[i]n certain cases," the two years

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[3] *See, e.g., United States* v. *Shearer*, 473 U.S. 52, 55, 59 (1985); *Kosak* v. *United States*, 465 U.S. 848, 858 n.17 (1984); *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 463-64 & n.4 (1980); *Dalehite*, 346 U.S. at 26 n.11, 28 n.17, 28 n. 20, 45.

would not begin running "until the plaintiff knows or in the exercise of reasonable diligence should know of both the injury and its cause." *Dyniewicz*, 742 F.2d at 486; *see also Kubrick*, 444 U.S. at 121; *Bartleson* v. *United States*, 96 F.3d 1270, 1277 (9th Cir. 1996). The Supreme Court has made clear that where Congress "provid[es] that [a] statute of limitations will not begin to run until the plaintiff knew or should have known of the claim," Congress has "already effectively allowed for equitable tolling" of a certain kind, and it therefore cannot be inferred that Congress also intended for courts to add an additional layer of tolling. *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998) (internal quotation marks omitted).

In 1988, Congress made another change to the two-year time rule that further demonstrates that the two-year period is not subject to equitable tolling. Congress created a specific, narrow exception to the two-year period for presenting the tort claim to an administrative agency to address cases in which plaintiff mistakenly brings the action against individuals, an exception that often arises in the context of a suit filed in state court. *See* 28 U.S.C. § 2679(d)(5). This limited exception to the timing deadlines likewise suggests that courts should not attribute to Congress any general intent to allow equitable tolling under the FTCA. *See Brockamp*, 519 U.S. at 351 (rejecting equitable tolling where statute "sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling'").

Finally, as we have explained, the FTCA's two-year time limit is meant "to achieve a broader system-related goal"—"facilitating the administration of claims," *John R. Sand & Gravel Co.*, 552 U.S. at 133. It is there to en-

courage the efficient administrative review by those who know about the activity at issue and therefore can sort meritorious from meritless claims and determine which claims should be settled. *See McNeil*, 508 U.S. at 112 n.7; *Brady*, 211 F.3d at 502-503; S. Rep. No. 89-1327, at 3. As the Supreme Court has noted, when federal agencies are tasked with processing monetary requests, Congress would not lightly allow for an "'equitable tolling' exception" that "could create serious administrative problems" such as forcing agencies "to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Brockamp*, 519 U.S. at 352.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 2013

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the Court's supplemental briefing order and the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with this Court's briefing order because it contains 4,890 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ ADAM JED
ADAM C. JED

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2013, I filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system.

/s/ ADAM JED
ADAM C. JED

PETITIONER'S BRIEF

No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the two-year time limit for filing an administrative claim with the appropriate federal agency under the Federal Tort Claims Act, 28 U.S.C. 2401(b), is subject to equitable tolling.

PARTIES TO THE PROCEEDING

Petitioner, who was the defendant in the district court and the appellee in the court of appeals, is the United States of America.

Respondent, who was the plaintiff in the district court and the appellant in the court of appeals, is Marlene June, in her capacity as "Conservator for minor and surviving son of deceased in his own right and on behalf of all statutory beneficiaries conservator for A.K.B. deceased, Anthony Edward Booth." Pet. App. 1a.

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In the Supreme Court of the United States

No. 13-1075

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is not published in the *Federal Reporter* but is reprinted at 550 Fed. Appx. 505. The order of the district court (Pet. App. 3a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 24, 2013. The petition for a writ of certiorari was filed on March 7, 2014, and was granted on June 30, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in the appendix to this brief. App., *infra*, 1a-12a.

STATEMENT

This case and *United States* v. *Wong*, No. 13-1074, involve whether the time limits set forth in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), may be equitably tolled by a court. Here, respondent presented an FTCA claim to the Federal Highway Administration (FHWA), an agency of the United States Department of Transportation, more than five years after that claim accrued. The FHWA denied that claim as untimely under the two-year deadline for presenting a claim to the appropriate federal agency, and the district court dismissed respondent's subsequent suit on the same basis. The court of appeals applied its recent decision in *Wong* v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013), cert. granted *sub nom. United States* v. *Wong*, No. 13-1074 (oral argument scheduled for Dec. 10, 2014), and reversed.

A. The Legal Background

1. Under established principles of sovereign immunity, federal courts generally lack jurisdiction to hear claims against the United States. *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). Congress enacted the FTCA in 1946 to "waive the United States' sovereign immunity for claims" for money damages "arising out of torts committed by federal employees." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 217-218 (2008). As a "condition" of that waiver, Congress required plaintiffs to sue on such claims within a specified period of time. *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). It further specified that any claims not satisfying that requirement "shall be forever barred." 28 U.S.C. 2401(b).

After several other revisions, Congress amended the FTCA in 1966 to require all claims to be presented

to an agency within two years of accrual as a prerequisite to filing suit in court. As amended, the FTCA time-limit provision now provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2401(b). This case involves Section 2401(b)'s two-year deadline for presenting a claim to a federal agency.

2. a. Traditionally, in the absence of a waiver of sovereign immunity, "the only recourse available to private claimants" for damages caused by the government was "to petition Congress for relief" in the form of private bills. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). In 1855, Congress established the Court of Claims to hear claims, report its findings to Congress, and provide drafts of private bills where the court's decision was favorable to the claimant. See Act of Feb. 24, 1855 (1855 Act), ch. 122, §§ 1, 7, 10 Stat. 612, 613; *Mitchell*, 463 U.S. at 212-213. The court's jurisdiction covered only contract claims, claims founded on federal statutes or regulations, and claims referred to the court by either House of Congress. 1855 Act § 1, 10 Stat. 612.

In 1863, Congress vested the Court of Claims with authority to enter binding judgments appealable to this Court. Act of Mar. 3, 1863 (1863 Act), ch. 92, §§ 3, 5, 7, 12 Stat. 765, 766 (Rev. Stat. §§ 707-708, 1061, 1089-1093 (1878)). The 1863 Act also provided that "every claim against the United States, cognizable by

the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of th[e] act within six years after the claim first accrues." *Id.* § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)) (emphasis added). The 1863 Act provided an exception to the time bar for claims accruing to married women, minors, the mentally disabled, and persons beyond the seas, requiring such claims to be brought within three years after the disability ceased. *Ibid.* This Court subsequently construed the 1863 Act's time limitation as a restriction of the Court of Claims' jurisdiction, not subject to waiver or equitable tolling. See *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-135 (2008) (discussing cases); pp. 20-21, *infra*.

In 1887, Congress enacted the Tucker Act, ch. 359, 24 Stat. 505, which extended the Court of Claims' jurisdiction to additional types of cases and granted the district courts and circuit courts concurrent jurisdiction in cases involving specified amounts in controversy. *Id.* § 2, 24 Stat. 505. This Court continued to treat the six-year filing requirement in the 1863 Act as a non-waivable jurisdictional constraint on the Court of Claims' authority. *John R. Sand & Gravel*, 552 U.S. at 135 (citing cases); pp. 21-22, *infra*. When Congress revised the laws relating to the Judiciary in 1911, it maintained the directive that any claim otherwise cognizable by the Court of Claims "shall be forever barred" unless filed within six years of accrual. Judicial Code (1911 Act), ch. 231, § 156, 36 Stat. 1139.[1]

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[1] Accord 1911 Act § 24 Twentieth, 36 Stat. 1093 (no suit in district court against the government "shall be allowed" unless

b. Neither the Tucker Act nor its predecessors created any general right of action with respect to *tort* claims against the United States. See *United States* v. *Tohono O'dham Nation*, 131 S. Ct. 1723, 1729 (2011).[2] In the early twentieth century, however, Congress enacted several statutes creating such remedies in various circumstances, including for claims alleging (1) patent infringement, see Act of June 25, 1910, ch. 423, 36 Stat. 851 (1910 Act); (2) damage caused by United States merchant vessels or those of its wholly owned corporations, see Suits in Admiralty Act, ch. 95, 41 Stat. 525 (1920); and (3) damage caused by other public vessels, see Public Vessels Act, ch. 428, 43 Stat. 1112 (1925). Courts recognized that the time limits for filing suit under those statutes were jurisdictional in nature. See pp. 28-29, *infra*.

In the absence of any general tort cause of action against the United States, however, persons with such claims continued to seek relief from Congress in the form of private bills. By the 1920s and 1930s, Congress was swamped with such requests. See *Dalehite* v. *United States*, 346 U.S. 15, 25 n.9 (1953) (cataloging thousands of private claim bills introduced in the 68th, 70th, 74th, 75th, 76th, 77th, and 78th Congresses). The backlog led many to criticize the private-bill system as both "unduly burdensome to the Congress"

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brought within six years of accrual) (now codified in substantially similar form at 28 U.S.C. 2501).

[2] The version of the Tucker Act that passed the House of Representatives authorized tort claims, but the Senate refused to waive sovereign immunity with respect to such claims. See H.R. 6974, 49th Cong., 1st Sess. § 1 (1887); 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 2.04, at 2-16 to 2-17 (Mar. 1994).

and "unjust to the claimants." S. Rep. No. 1400, 79th Cong., 2d Sess. 30-31 (1946) (1946 Senate Report). As a result, between 1925 and 1946, Congress considered over 30 proposals to create judicial or administrative remedies for tort claims against the government. 1 Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* §§ 2.08-2.10, at 2-48 to 2-66 (Mar. 1994) (Jayson & Longstreth) (discussing proposals).

c. In 1946, Congress enacted the FTCA as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842. It granted district courts exclusive jurisdiction—"[s]ubject to the provisions of [Title IV]"—to adjudicate tort claims against the United States in circumstances where "a private person[] would be liable to the claimant" under local law. FTCA, ch. 753, § 410(a), 60 Stat. 843-844.

One of the provisions of Title IV on which Congress "condition[ed]" the grant of jurisdiction was Section 420, which contained time limits for bringing FTCA claims in court. *Kubrick*, 444 U.S. at 117; FTCA § 420, 60 Stat. 845. That provision included precisely the same language as the 1863 and 1911 Acts applicable to the Court of Claims, declaring that any tort claim "shall be forever barred" unless either (1) it was filed in court within one year of accrual, or (2) it sought less than $1000 and was presented in writing to the federal agency responsible for the alleged harm within one year. *Ibid.* In the latter circumstance, the time to file suit was "extended for a period of six months" following the agency's denial of the claim. *Ibid.*

Congress subsequently revised the FTCA time bars several times. See Jayson & Longstreth § 2.13,

at 2-72 to 2-78 (Sept. 2001). In 1948, as part of a general recodification of Title 28, it relocated the FTCA's provisions to different places in Chapters 85, 161, and 171.[3] The Reviser's Note makes clear that Congress intended the 1948 revision to make no substantive change to those provisions. H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947).

In 1949, Congress enlarged Section 2401(b)'s time limit for filing a claim from one year to two years. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62. And in 1966, it made the filing of an administrative claim with the responsible agency—within two years of accrual—a mandatory prerequisite to filing suit in court on all FTCA claims. Act of July 18, 1966 (1966 Act), Pub. L. No. 89-506, §§ 2(a), 7, 80 Stat. 306, 307. Congress also adjusted the time limit for filing suit to six months after administrative denial of the claim. *Ibid.* That version of Section 2401(b) remains in effect today.

B. The Present Controversy

1. On February 19, 2005, Andrew Edward Booth was killed in a car accident on an interstate highway in Arizona when the vehicle in which he was traveling crossed a cable median barrier and crashed into oncoming traffic. Pet. App. 3a-4a. In 2006, decedent's minor son, by and through respondent, filed a wrongful death action against a contractor and against the State of Arizona for negligently installing and maintaining the median barrier. See J.A. 26-33. Respond-

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[3] See Act of June 25, 1948 (1948 Act), ch. 646, sec. 1, §§ 1346, 2401, 2671-2680, 62 Stat. 933, 971, 982-985. The 1948 Act referred to Chapter 173, not Chapter 171, but that scrivener's error was corrected the following year. See Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62.

ent did not file an administrative claim with any agency of the United States at that time.

In 2006 and 2007, respondent's then-counsel repeatedly inquired whether the FHWA had permitted Arizona to install cable median barriers that had not been properly crash-tested and approved in accordance with National Cooperative Highway Research Project Report 350 (NCHRP Report 350). J.A. 34-45, 56-72. In a series of letters and Freedom of Information Act requests, counsel noted Arizona's position in various separate law suits that the FWHA had approved its use of the barriers. J.A. 41-43, 57-58, 65-68.

In 2007 and 2008, respondent's counsel, representing other plaintiffs, presented administrative claims and filed two FTCA suits against the United States alleging negligence related to the same type of cable barriers at issue here. See Complaint, *Melvin* v. *United States*, No. 08-cv-950 (D. Ariz., May 20, 2008) (*Melvin I* Complaint); Complaint, *Melvin* v. *United States*, No. 08-cv-1666 (D. Ariz. Sept. 10, 2008) (*Melvin II* Complaint). Both complaints alleged that the FHWA had negligently allowed installation of these cable barriers and pointed to a witness in a state civil action who had purportedly testified that the FHWA had approved the barriers. See *Melvin I* Complaint paras. 14-15; *Melvin II* Complaint paras. 14-15.

2. On December 20, 2010, more than five years after the car accident, respondent presented an administrative FTCA claim to the FHWA. J.A. 120. On March 18, 2011, the FHWA denied respondent's claim. J.A. 121.

On May 5, 2011, respondent filed this FTCA action against the United States in federal court. See J.A.

117-124. Respondent alleged that the FHWA had "negligently failed to comply with its own policies and federal law mandating that safety barriers installed" on national highways "undergo crash testing and approval." Pet. App. 4a; see J.A. 122-123. The United States moved to dismiss for lack of jurisdiction. J.A. 125-140. The government argued, *inter alia*, that respondent had failed to file an administrative claim with the FHWA within two years of accrual, and that the suit was therefore barred by 28 U.S.C. 2401(b). J.A. 128-136.

Respondent opposed the government's motion and argued that her claim was in fact timely presented to the FHWA. J.A. 159-162. She asserted that the government had concealed facts relevant to its approval of the cable barriers by refusing to make its employees available for depositions in separate litigation against the State of Arizona, and she argued that the court should either permit equitable tolling of Section 2401(b)'s two-year time limit or find that her claim did not accrue until after she discovered the relevant facts in April 2009. J.A. 144-148. Respondent moved for leave to amend her complaint to include the various factual allegations supporting these arguments. J.A. 8, 144-148, 159.

In November 2011, the district court granted the government's motion to dismiss, denied respondent leave to amend her complaint, and dismissed the case. Pet. App. 3a-12a. The court began by rejecting respondent's assertion that her claim did not accrue until April 2009. It explained that "[a] tort action against the United States accrues 'when a plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Id.* at 6a (quoting *Hensley* v.

United States, 531 F.3d 1052, 1056 (9th Cir. 2008), cert. denied, 556 U.S. 1257 (2009)). The court found that respondent "knew of the injury and its immediate physical cause" on the day of the accident and that "[n]one of the facts relevant to the accrual of [respondent's] claims were unknown to [respondent] or concealed by the United States." *Id.* at 6a.

The district court also rejected respondent's request for equitable tolling. Pet. App. 7a-9a. It explained that under this Court's decision in *John R. Sand & Gravel Co.*, 552 U.S. at 133-134, a federal statute of limitations is jurisdictional—and is not subject to waiver or equitable tolling—when it seeks to "limit[] the scope of a governmental waiver of sovereign immunity." Pet. App. 7a-8a (citation omitted). The court also relied on the Ninth Circuit's decision in *Marley* v. *United States*, 567 F.3d 1030, 1037, cert. denied, 558 U.S. 1076 (2009), which held that Section 2401(b)'s six-month deadline for filing suit in court is jurisdictional. Pet App. 8a.

3. Respondent appealed the district court's denial of equitable tolling, but not its accrual holding. After briefing in this case was complete—but before oral argument—the court of appeals decided *Wong*, *supra*, which held that Section 2401(b)'s six-month time limit for filing suit after the denial of an administrative claim is nonjurisdictional. The court requested supplemental briefs on whether to apply *Wong*'s holding to this case. J.A. 3-4. In response, respondent argued that the court's *Wong* decision "mandate[d] reversal" because the district court in this case "did exactly what the district court did in *Wong*—it dismissed an FTCA action on the premise that [Section] 2401(b) is

jurisdictional and that equitable tolling does not apply." Resp. C.A. Supp. Br. 9.

In December 2013, the court of appeals issued an unpublished memorandum decision reversing "[i]n light of *Wong*." Pet. App. 1a-2a. The court explained that *Wong* held that Section 2401(b) is not jurisdictional and "that equitable adjustment of the limitations period in that section is not prohibited." *Id.* at 2a. Although *Wong* involved the FTCA's six-month suit-filing deadline—and not the two-year deadline for first presenting the claim to the appropriate federal agency—the court drew no distinction between those two time limits.

SUMMARY OF ARGUMENT

The FTCA provides that a tort claim against the United States "shall be forever barred" if it is not presented to a federal agency within two years of when the claim accrues. 28 U.S.C. 2401(b). Like the six-month deadline at issue in *Wong*, that two-year limit is a jurisdictional requirement that is not subject to equitable tolling. Because respondent's claim was filed more than five years after it accrued in February 2005, it was properly dismissed by the district court.

A. Under this Court's precedent, whether a statutory time limit is subject to equitable tolling ultimately turns on Congress's intent. This Court has established a "rebuttable presumption" allowing tolling of time limits for filing suit in appropriate circumstances, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), but it has never applied that presumption to the sort of administrative filing deadline at issue here. Equitable tolling is not appropriate when Congress intended a time bar to serve as a jurisdictional

limit on the power of district courts. Tolling may also be precluded even if the time bar is nonjurisdictional.

B. When Congress enacted the FTCA in 1946, it intended the statutory time limit for filing suit to be a jurisdictional requirement not subject to equitable tolling. First, Congress borrowed the statutory text of that time bar from the 1863 and 1911 Acts governing Tucker Act suits in the Court of Claims. At the time, this Court had already repeatedly interpreted those virtually identical provisions—addressing closely analogous damages actions against the United States—to be jurisdictional limitations forbidding courts from tolling the time limits for filing suit. Those provisions had a settled legal meaning, and Congress adopted that meaning when it incorporated their "shall be forever barred" directive into the FTCA. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011).

Second, Congress understood the FTCA time limit as a condition on its waiver of sovereign immunity. Congress legislated against a background assumption that such time bars would be strictly construed not to permit equitable tolling. This Court acknowledged that background rule in *Soriano* v. *United States*, 352 U.S. 270 (1957), where it explained that Congress enacted the Tucker Act and statutes allowing tort claims against the government on the "assum[ption] that the limitation period it prescribed meant just that period and no more." *Id.* at 275-276. Decades later, in *Irwin*, this Court announced a new (and quite different) background assumption with respect to time limits for filing suit in court, but it confirmed that what ultimately matters is the enacting Congress's actual intent.

Other aspects of the original FTCA's text and history confirm that equitable tolling is prohibited. For example, the "shall be forever barred" formulation itself constrains jurisdiction by "confin[ing]" the district court's power of "review" over the case, as this Court expressly recognized in *Kontrick* v. *Ryan*, 540 U.S. 443, 453 (2004). The absence of any exceptions to the bar starkly contrasts with the otherwise-comparable provision applicable to Tucker Act claims.

C. The subsequent evolution of the FTCA reinforces the conclusion that equitable tolling is not available with respect to either of Section 2401(b)'s time limits. In 1949, Congress extended the suit filing deadline for an extra year to address hardship cases, thereby confirming that such cases are to be addressed by Congress itself, not by courts via equitable tolling. Congress then reenacted the time bar in 1966—after *Soriano* and at a time when the uniform view of the circuit courts was that tolling of Section 2401(b) was *not* available.

In addition, from the 1950s through the 1980s, Congress passed a series of private laws expressly conferring "jurisdiction" on district courts to hear untimely FTCA claims "notwithstanding" Section 2401(b)—including in cases where the claimants were seeking relief from the two-year administrative-presentment deadline. And throughout that same period, Congress repeatedly declined to enact proposals authorizing limited forms of tolling. The only exception was in 1988, when Congress authorized one form of tolling applicable only in a single, carefully delineated circumstance not at issue here.

D. Additional features of the two-year presentment deadline confirm that Section 2401(b) imposes juris-

dictional requirements not subject to equitable tolling. That deadline is textually linked to the FTCA's mandatory administrative exhaustion requirement—set forth in 28 U.S.C. 2675(a)—which this Court has already held to be jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993). Allowing courts to toll the two-year deadline would undermine the purpose of the exhaustion requirement, which is to allow the appropriate agency to consider the merits of the claim in the first instance, before any resort to litigation. And tolling would create practical difficulties by forcing agencies to decide whether to address the merits of untimely claims without knowing whether a court might subsequently toll the time limit. These considerations reinforce the conclusion that compliance with both of Section 2401(b)'s time limits is a mandatory prerequisite to the exercise of jurisdiction by the courts.

ARGUMENT

THE FEDERAL TORT CLAIMS ACT'S TIME BARS ARE NOT SUBJECT TO EQUITABLE TOLLING

The government's opening brief in *Wong*, No. 14-1074, explains that the text, history, and purpose of the FTCA establish that the six-month time limit for filing suit is a jurisdictional requirement not subject to equitable tolling. See U.S. Br. at 17-52, *United States* v. *Wong*, No. 14-1074 (Sept. 9, 2014). That analysis—which is substantially replicated here below—supports the same conclusion with respect to the two-year deadline for presenting a claim to an agency.

When Congress added the two-year deadline in 1966, it did so as an amendment to Section 2401(b), which had always included the suit-filing deadline. Whereas the original version of that provision had

given a tort plaintiff the option of presenting certain tort claims (worth less than $1000) to federal agencies within one year, the 1966 amendments made presentment mandatory for all claims and extended the presentment deadline to two years. In making these changes, Congress subjected the two-year time limit to the same operative command for failure to comply ("shall be forever barred") that had always applied to the deadline for filing an FTCA claim in court. Nothing in the text or relevant legislative history of the 1966 reenactment suggests that the respective time bars should be interpreted differently with respect to whether they are jurisdictional or subject to equitable tolling. And indeed, as explained below, textual and other considerations make it especially clear that the two-year time bar, and thus Section 2401(b), is jurisdictional and not subject to tolling.

Here, respondent presented her FTCA claim to the FHWA more than five years after her claim accrued in February 2005. Pet. App. 6a-7a; J.A. 120. That claim was untimely under Section 2401(b), and it was properly dismissed by the district court. The court of appeals' conclusion to the contrary is erroneous and should be reversed.

A. Whether Equitable Tolling Is Available Turns On Statutory Intent

The doctrine of equitable tolling "pauses the running of * * * a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). In recent years, this Court has adopted a rebuttable presumption that federal statutes of limitation requiring that suits be filed in

court by a certain time—including those applicable to suits against the United States—are subject to equitable tolling. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

This Court has emphasized, however, that it "do[es] not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose." *Lozano*, 134 S. Ct. at 1236. Rather, "whether equitable tolling is available is fundamentally a question of statutory intent." *Id.* at 1232; see *Irwin*, 498 U.S. at 95 (justifying rebuttable presumption as "a realistic assessment of legislative intent"); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) (noting that purpose of presumption is to "accurately reflect Congress's likely meaning in the mine run of instances where it enacted a Government-related statute of limitations"). The presumption in favor of tolling may therefore be rebutted "by demonstrating Congress's intent to the contrary." *Ibid.*

One way to show that equitable tolling is unavailable is to establish that the statutory time limit is a "jurisdictional" restriction on a court's power to adjudicate the case. *John R. Sand & Gravel*, 552 U.S. at 133-134. A jurisdictional limit is "more absolute" than other time limits; it "require[s] a court to decide a timeliness question despite a [party's] waiver" and "forbid[s] a court to consider whether certain equitable considerations warrant extending a limitations period." *Ibid.* Jurisdictional treatment is appropriate, for example, when a statutory time bar "seek[s] not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-

related goal, such as * * * limiting the scope of a governmental waiver of sovereign immunity." *Ibid.*

For a statutory time limit to qualify as jurisdictional, this Court requires a "clear indication" from Congress. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks omitted). But Congress "need not use magic words in order to speak clearly." *Ibid.* Ultimately, the analysis focuses on the "legal character" of the filing requirement, as evident in the "text, context, and relevant historical treatment" of the statutory provision at issue. *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010) (citation omitted). And significantly in this case, "[w]hen 'a long line of this Court's decisions left undisturbed by Congress' has treated a similar requirement as 'jurisdictional,' [the Court] will presume that Congress intended to follow that course." *Henderson*, 131 S. Ct. at 1203 (citation omitted).

Even if a limitations period is not jurisdictional, equitable tolling may still be precluded. See *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 826-828 (2013) (holding nonjurisdictional statutory time limit not subject to equitable tolling). As with the jurisdictional analysis, the basic inquiry examines Congress's intent—and, specifically, whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). That question must be answered using traditional tools of statutory construction. See, *e.g.*, *id.* at 351-354 (rejecting equitable tolling based on text, context, purpose, and history of statutory time limit); see also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (similar).

B. The FTCA Time Limits For Filing Suit Were Not Subject To Equitable Tolling When Enacted In 1946

The statutory text, history, and purpose all confirm that Congress originally understood the deadline for filing an FTCA claim in court as a mandatory time bar not subject to equitable tolling. That time bar is a jurisdictional limit on the court's power to act. But tolling is precluded even if this Court were to determine that Section 2401(b)'s time limit is nonjurisdictional. To the extent the *Irwin* presumption in favor of equitable tolling applies to this case, it is rebutted by the strong textual and historical evidence of Congress's intent.

1. Congress used the exact language that this Court had repeatedly construed as jurisdictional in the directly parallel context of Tucker Act suits

This Court has often recognized that "[w]hen * * * judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well." *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998).[4] The Court has endorsed this principle in the precise context at issue here—when determining whether a particular statutory time limit qualifies as jurisdictional. As the Court recently explained in *Henderson*, it "will presume" that Congress intended to make a time limit jurisdictional "[w]hen a

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[4] See, *e.g.*, *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as 'jurisdictional.'" 131 S. Ct. at 1203 (internal quotation marks and citation omitted) (citing *John R. Sand & Gravel*, 552 U.S. at 133-134).[5]

That rule resolves this case. When Congress drafted the FTCA time bar in 1946, it used the same unequivocal text ("shall be forever barred") that appeared in the parallel time bars applicable to monetary claims against the United States under the 1863 and 1911 Acts. This Court had already interpreted that language—on at least *six* separate occasions—as imposing a jurisdictional requirement not subject to waiver or equitable tolling. In these circumstances, the only reasonable conclusion is that Congress intended the FTCA's identically worded time limit to be a jurisdictional bar prohibiting district courts from adjudicating untimely claims.

a. The text Congress chose for the FTCA's suit-filing bar is materially indistinguishable from the text it had previously used to set deadlines for damages actions against the United States in the Court of Claims under the Tucker Act and its predecessors. See p. 6, *supra*. Those earlier formulations had emphatically declared that "[e]very claim against the United States" under the relevant statute "shall be

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[5] See also *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 824 (confirming that "this Court's interpretations of similar provisions in many years past" is "probative of whether Congress intended a particular provision to rank as jurisdictional") (citation omitted); *Reed*, 559 U.S. at 168 (same); *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007).

forever barred" if not filed within a stated period of time, subject to certain specific exceptions.[6]

This Court first interpreted that language in *Kendall* v. *United States*, 107 U.S. 123 (1883). There, the Court rejected the plaintiff's request for tolling under the 1863 Act on the ground that he was not able to bring his claim within the statutory period due to legal disabilities imposed by Congress during the Civil War. *Id.* at 124-125. The Court explained that the time bar was "jurisdiction[al]," that it was not subject to judicial "engraft[ing]" of exceptions such as "sickness, surprise, or inevitable accident," and that "it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not." *Id.* at 125-126; see *John R. Sand & Gravel*, 552 U.S. at 134 (summarizing *Kendall* in those terms).

Several years later, this Court reaffirmed its jurisdictional analysis in *Finn* v. *United States*, 123 U.S. 227 (1887). There, the Court rejected the argument that the government could waive the time bar when opposing a claim. It explained that "[t]he duty of the court" when faced with an untimely claim—"whether

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[6] Compare FTCA § 420, 60 Stat. 845 ("Every claim against the United States cognizable under this title *shall be forever barred*, unless within one year after such claim accrued [the claim is presented to the responsible agency or] an action is begun.") (emphasis added), with 1911 Act § 156, 36 Stat. 1139 ("Every claim against the United States cognizable by the Court of Claims, *shall be forever barred* unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues.") (emphasis added), and 1863 Act § 10, 12 Stat. 767 ("[E]very claim against the United States, cognizable by the court of claims, *shall be forever barred* unless the petition setting forth a statement of the claim be filed in the court * * * within six years after the claim first accrues.") (emphasis added).

limitation [i]s pleaded [by the United States] or not" is "to dismiss the petition." *Id.* at 232. The Court noted that "the statute * * * makes it a condition or qualification of a right to a judgment against the United States that—except where the claimant labors under one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant * * * within six years after suit could be commenced thereon against the Government." *Ibid.*; see *John R. Sand & Gravel*, 552 U.S. at 134-135 (discussing *Finn*).

After the Tucker Act was passed in 1887, this Court continued to treat the 1863 Act's time bar as a non-waivable jurisdictional constraint on the Court of Claims' authority. For example, in *de Arnaud* v. *United States*, 151 U.S. 483 (1894), the Court affirmed the dismissal of a claim that had accrued in 1862 but had not been submitted to the Treasury Department until 1886. See *id.* at 489, 492-495. The Court quoted at length from its prior decision in *Finn*, explaining that the six-year bar applied whether the government had raised the point or not. See *id.* at 495-496 (quoting *Finn*, 123 U.S. at 232-233); accord *United States* v. *New York*, 160 U.S. 598, 616-619 (1896); see also *Munro* v. *United States*, 303 U.S. 36, 38 n.1, 41 (1938) (applying *Finn* and reaching same conclusion under 1930 statute incorporating Tucker Act procedures). Similarly, in *United States* v. *Wardwell*, 172 U.S. 48 (1898), the Court reaffirmed that the six-year filing requirement imposed by the 1863 Act was "not merely a statute of limitations *but also jurisdictional in its nature*,

and limiting the cases of which the Court of Claims can take cognizance." *Id.* at 52 (emphasis added).[7]

b. The legislative history establishes that Congress intended the FTCA to serve as the tort-claim analogue to the Tucker Act and thus confirms that the identical "shall be forever barred" language in the FTCA time bar is likewise a jurisdictional limitation. The Senate Report on the FTCA pointed to the Tucker Act's waiver of sovereign immunity for certain claims and stated that the Tucker Act's "existing exemption in respect to common-law torts appears incongruous." 1946 Senate Report 31. Similarly, committee reports discussing early drafts of the tort bill emphasized that they would grant tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196,

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[7] Congress had also previously used the same "shall be forever barred" formulation to establish a ten-year time limit for submitting claims for payment to the General Accounting Office (GAO). See Act of Oct. 9, 1940, ch. 788, § 1, 54 Stat 1061 (31 U.S.C. 71a(1), 237(1) (1946)) ("[E]very claim or demand * * * against the United States cognizable by the [GAO] under [31 U.S.C. 71 and 236 (1946)], shall be forever barred unless such claim * * * shall be received [by GAO] within ten full years after the date such claim first accrued."). By 1946, the Comptroller General had interpreted that time bar as an absolute limit on his authority to consider untimely claims. See, *e.g.*, *Overtime Compensation—Forty-Hour Week Employees—Night Work—Claim Procedure*, 25 Comp. Gen. 670, 672 (1946) (explaining that bar "expressly prohibits consideration by the [GAO]" of untimely claims and that GAO "has been granted no powers of dispensation in the matter and, consequently, it legally may make no exceptions to the provisions of the statute"); *Overtime Compensation—Forty-Hour Week Employees—Night Work*, 24 Comp. Gen. 550, 553-555 (1945) (similar).

77th Cong., 2d Sess. 5 (1942).[8] They also frequently explained the history, purpose, and operation of the Tucker Act and emphasized the need for similar legislation to cover tort claims.[9]

More specifically, the House Reports addressing draft tort-claim bills proposed in 1942 and 1945—which contained the exact same time bar enacted in the FTCA in 1946—declared that those bills were "intended" to grant district courts the power to "exercise essentially the same type of jurisdiction as district courts exercise concurrently with the Court of Claims of the United States under the Tucker Act." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 9 (1942). At that time, of course, this Court had already definitively held that the jurisdiction of the Court of Claims was constrained by the six-year time bar—and that the bar was not subject to waiver or equitable tolling. See pp. 20-22, *supra*.[10]

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[8] See, *e.g.*, H.R. Rep. No. 286, 70th Cong., 1st Sess. 2 (1928) (noting Tucker Act and urging adoption of "like provisions" applicable to certain property damage claims); H.R. Rep. No. 667, 69th Cong., 1st Sess. 12 (1926) (reviewing sovereign immunity and stating that proposed claims bill "extends the practice" in Tucker Act); see also H.R. Doc. No. 562, 77th Cong., 2d Sess. 2 (1942) (message from President Franklin D. Roosevelt urging Congress to give tort claimants "the same right to a day in court which claimants now enjoy in fields such as breach of contract"); 86 Cong. Rec. 12,026 (1940) (statement of Rep. McLaughlin) (pointing to Tucker Act as "precedent to govern our conduct in this case").

[9] See, *e.g.*, 1946 Senate Report 31; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2-3 (1945); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 7 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. 2-3 (1940).

[10] Although many of the draft tort claim bills that Congress considered in the 1930s used the "shall be forever barred" formula-

c. Thus when Congress enacted the FTCA time bar in 1946, it adopted a formulation that this Court had already interpreted—multiple times, in the directly analogous context of the Tucker Act—to limit the jurisdiction of federal courts to adjudicate claims against the United States. That is more than sufficient reason to conclude that Congress intended the FTCA time bar to be a jurisdictional requirement not subject to equitable tolling. After all, in 1946, as today, it was well settled that "in adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment." *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924).[11]

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tion, a number of those that did not nonetheless made explicit that the deadlines for suing on tort claims were jurisdictional requirements. See, *e.g.*, S. 1043, 74th Cong., 1st Sess. § 304 (1935) ("The Court of Claims *shall have jurisdiction* to hear and determine any claim allowable as provided in this Act *subject to the following limitations*: (1) That no such suit may be maintained until the claim has been duly filed with the Comptroller General and his decision had thereon * * * ; (2) that no such suit shall be instituted after the expiration of one year from the date of the decision of the Comptroller General."); S. 1833, 73d Cong., 1st Sess. § 304 (1933) (same); S. 4567, 72d Cong., 1st Sess. § 304 (1932) (same). Those other bills thus confirm that Congress envisioned that the FTCA time limits would operate as jurisdictional constraints on the courts' power to adjudicate claims.

[11] See, *e.g.*, *United States* v. *Merriam*, 263 U.S. 179, 187 (1923) ("The word 'bequest' having the judicially settled meaning which we have stated, we must presume it was used in that sense by Congress."); *Kepner* v. *United States*, 195 U.S. 100, 124 (1904) ("It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body."); *The "Abbotsford,"* 98 U.S. 440, 444 (1879); 2 Frank E. Horack Jr., *Statutes and Statutory Construction* § 5201, at 532-

Congress's decision to borrow the language of the 1863 and 1911 Acts clearly manifested its intent to prohibit equitable tolling of FTCA claims.

d. Recent precedent also confirms that this Court's prior construction of the 1863 and 1911 Acts supports treating the FTCA time bar as jurisdictional. In *Bowles* v. *Russell*, 551 U.S. 205 (2007), this Court held that the 30-day limit in 28 U.S.C. 2107 for filing a notice of appeal is a jurisdictional requirement not subject to waiver or equitable tolling. 551 U.S. at 209-213. It rooted that conclusion largely in its assessment of "this Court's historical treatment of *the type of limitation* [Section] 2107 imposes (*i.e.*, statutory deadlines for filing appeals)." *Reed*, 559 U.S. at 168 (emphasis added) (discussing *Bowles*); *Bowles*, 551 U.S. at 208-210. As the Court later explained, "[t]he statutory limitation in *Bowles* was of a type that we had long held *did* speak in jurisdictional terms, even absent a 'jurisdictional' label, and nothing about [Section] 2107's text or context, or the historical treatment of that type of limitation, justified a departure from this view." *Reed*, 559 U.S. at 168 (first set of internal quotation marks omitted).

The same is true here. For the reasons explained above, the FTCA time limit for filing suit is "of a type" that this Court has long held *does* "speak in jurisdictional terms." *Reed*, 559 U.S. at 168. The FTCA time bar uses the same language and serves the same purpose—prescribing a specific time limit as a condition

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535 (3d ed. 1943) ("Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense.") (footnote omitted); Earl T. Crawford, *The Construction of Statutes* § 187, at 321 (1940) (same point).

of the waiver of sovereign immunity for suits against the United States for money damages—as the parallel provisions applicable to Tucker Act claims. Those provisions should all be interpreted the same way.

This Court's decision in *John R. Sand & Gravel* is also instructive. There, the Court reaffirmed that the time bar applicable to Tucker Act claims is a jurisdictional limit on the authority of district courts. 552 U.S. at 133-139. The Court explained that "[s]pecific statutory language" and "a definitive earlier interpretation" of virtually identical predecessor statutes can establish that a statutory time limit is jurisdictional and not subject to equitable tolling. *Id.* at 134-138. In this case, the Court should once again apply that settled precedent and hold that the "shall be forever barred" formulation that appeared in the 1863 and 1911 Acts—and that Congress incorporated into the FTCA—has jurisdictional effect. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (applying precedent interpreting one statute to a later statute "derived *in haec verba*" from the first statute) (citation omitted).

2. Congress enacted the FTCA time bar against background principles concerning waivers of sovereign immunity that treated such time bars as jurisdictional

In *John R. Sand & Gravel*, this Court explained that when a federal statute of limitations "achieve[s] a broader system-related goal"—such as "limiting the scope of a governmental waiver of sovereign immunity"—it may properly be characterized as "jurisdictional." 552 U.S. at 133-134 (citing *United States* v. *Dalm*, 494 U.S. 596, 609-610 (1990)). That tracks the understanding that prevailed when Congress enacted

the FTCA in 1946. At that time, courts construed all of the various time limits applicable to claims for money damages against the United States as jurisdictional conditions on Congress's waiver of sovereign immunity. Congress would not have expected the FTCA time limit to be treated any differently.[12]

a. When Congress enacted the FTCA, this Court had long established both (1) that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued," and (2) that "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). It was also settled that if Congress included a statute of limitations in a law waiving sovereign immunity with respect to a type of claim, compliance with that requirement was one of those "terms of [Congress's] consent to be sued" limiting the court's jurisdiction.

This Court had embraced that latter point many times, including in some of the cases holding that the

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[12] In *Irwin*, this Court explained its new, rebuttable presumption of equitable tolling by noting that "[o]nce Congress has made * * * a waiver [of sovereign immunity]," permitting equitable tolling "amounts to little, if any, broadening of [that] waiver." 498 U.S. at 95. But the Court justified that assertion—and the rebuttable presumption itself—as reflecting what it thought was "a realistic assessment of legislative intent," *ibid.*, and it later confirmed that the presumption can be rebutted "by demonstrating Congress's intent to the contrary," *John R. Sand & Gravel*, 552 U.S. at 138. Here, Congress understood the FTCA time bar as jurisdictional in significant part *because* it operated as a limit on the waiver of sovereign immunity to monetary claims against the United States. *Irwin*'s background presumption therefore does not "accurately reflect Congress's likely meaning" with respect to the FTCA, *id.* at 137, and it does not govern this case.

time bar applicable in the Court of Claims was a jurisdictional requirement not subject to waiver or equitable tolling. In *Finn*, for example, the Court declared that "[a]s the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, *brought within a prescribed period*." 123 U.S. at 231 (emphasis added); see *Munro*, 303 U.S. at 41 (citing *Finn* and applying same analysis). And in *Kendall* the Court explained that "the government could not be sued without its consent," that Congress "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and that the statutory bar on untimely claims was itself one such "restriction[] which that court may not disregard." 107 U.S. at 125.[13]

The rule that statutory time limits governing suits against the United States for money damages are jurisdictional in nature was not unique to Tucker Act claims. On the contrary, in the decades leading up to the FTCA, federal courts had enforced that rule with respect to the other suits that Congress had authorized against the United States. Thus the Second Circuit had treated the statutory time limit set forth in

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[13] The Court continued to apply that rule after 1946. See, *e.g.*, *Soriano* v. *United States*, 352 U.S. 270, 273-276 (1957) (reaffirming that time bar applicable to Tucker Act claims is not subject to equitable tolling and stating that "this Court *has long decided* that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied") (emphasis added); see also *Dalm*, 494 U.S. at 608 (citing cases for proposition that a "statute of limitations requiring that a suit against the Government be brought within a certain time period" restricts waiver of sovereign immunity and "define[s] the court's jurisdiction to entertain the suit") (citation omitted).

the Suits in Admiralty Act—and also applicable to the Public Vessel Act—as jurisdictional. See *Phalen* v. *United States*, 32 F.2d 687, 687-688 (2d Cir. 1929) (holding that district court lacked "jurisdiction" due to plaintiff's failure to comply with time limit). And the Court of Claims had reached the same conclusion with respect to patent-infringement claims against the United States under the 1910 Act. *Rodman Chem. Co.* v. *United States*, 65 Ct. Cl. 39, 43, cert. denied, 277 U.S. 592 (1928) (emphasizing that time limit was "jurisdictional"); *E.W. Bliss Co.* v. *United States*, 53 Ct. Cl. 47, 65 (1917) (same, relying on Tucker Act ruling in *Wardwell*).[14] This Court had also applied the same jurisdictional rule to a statute that authorized the Seminole Nation to bring claims against the United States but declared any claim not brought within a specified time period to be "forever barred." *United States* v. *Seminole Nation*, 299 U.S. 417, 419, 421-422 (1937) (citing *Finn* and tying jurisdictional holding to statute's waiver of sovereign immunity).

b. The FTCA time bar is likewise a condition on the waiver of sovereign immunity. This Court said so expressly in *United States* v. *Kubrick*, 444 U.S. 111 (1979), where it noted that the FTCA "waives the immunity of the United States" and emphasized that "in construing the statute of limitations, *which is a condition of that waiver*, we should not take it upon ourselves to extend the waiver beyond that which

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[14] Congress was well aware of these other statutes when it enacted the FTCA. See, *e.g.*, 1946 Senate Report 31; S. Rep. No. 1196, 77th Cong., 2d Sess., at 5 (1942) (noting that proposed bill would "extend to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as * * * patent infringement, or admiralty claims").

Congress intended." *Id.* at 117-118 (emphasis added) (citing *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).[15] Congress therefore would have expected courts to apply the FTCA time bar as a jurisdictional requirement—just as conditions on waivers of sovereign immunity had always been applied.

This Court's 1957 *Soriano* decision strongly supports that conclusion. The plaintiff in that case was a resident of the Philippines who sought compensation under the Tucker Act for the requisitioning of food and equipment during World War II. *Soriano*, 352 U.S. at 270-271. He filed his claim outside the six-year time limit set forth in 28 U.S.C. 2501, but argued that the time limit should have been tolled for the duration of the war. 352 U.S. at 272. This Court rejected the tolling request as inconsistent with Congress's intent to enact strict time limits on the scope of its waiver of sovereign immunity. *Id.* at 275-277.

Notably, the Court ranged beyond the Tucker Act context and directly addressed Congress's intent with respect to other claims, including tort claims. The government's brief had expressed concern that allowing equitable tolling of Tucker Act claims would logically imply the same result for claims under other statutes waiving sovereign immunity to suits against the United States, and it cited the FTCA as well as the Suits in Admiralty Act and the Act of 1910.[16] The

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[15] See 1946 Senate Report 29 (explaining that FTCA waives sovereign immunity "with certain limitations"); *John R. Sand & Gravel*, 552 U.S. at 133 (recognizing that statutes of limitations "limit[] the scope of a governmental waiver of sovereign immunity").

[16] U.S. Supp. Br. at 41-45, *Soriano*, *supra* (No. 49) (noting that FTCA does not contain provision tolling time limit for legal disabil-

Court shared that concern, which it emphasized in its opinion:

> To permit the application of the doctrine urged by petitioner *would impose the tolling of the statute in every time-limit-consent Act* passed by the Congress. For example, statutes permitting suits for tax refunds, *tort actions*, alien property litigation, patent cases, and other claims against the Government would all be affected. Strangely enough, Congress would be required to provide expressly in *each statute* that the period of limitation was not to be extended by war.

Soriano, 352 U.S. at 275-276 (emphases added).

The Court accordingly rejected the argument that tolling was available under those statutes unless Congress expressly stated otherwise. *Soriano*, 352 U.S. at 274-276. It recognized that any other result would be contrary to Congress's expectation that courts would strictly enforce statutory time limits when they are conditions on its waiver of sovereign immunity:

> *Congress was entitled to assume that the limitation period it prescribed meant just that period and no more.* With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.

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ity and then arguing that "*[t]he rule of construction sought by petitioner would subject to indefinite extension every statute conferring a limited consent to sue the United States*").

Id. at 276 (emphasis added) (footnote omitted).

It may be that after *Irwin*, this Court would not, without more, apply *Soriano*'s categorical rationale to any new statute waiving immunity for claims against the United States. *Irwin*, 498 U.S. at 94-96; see *Holland* v. *Florida*, 560 U.S. 631, 646 (2010). But *Irwin* itself recognized that the availability of equitable tolling turns on a "realistic assessment of legislative intent." 498 U.S. at 95; see *John R. Sand & Gravel*, 552 U.S. at 137-138. And *Soriano* explained that when Congress passed the Tucker Act and then the subsequent tort statutes, it expected the statutory time limits for filing claims to carry jurisdictional consequences. In that era—and in that specific context—Congress did not expect its silence to be taken as implicit consent to equitable tolling. Because tolling is inconsistent with any "realistic assessment" of Congress's intent, *Irwin*, 498 U.S. at 95, it is not available under the FTCA.

3. Other aspects of the FTCA's text and history confirm that Congress did not endorse equitable tolling

Additional features of the FTCA's text and history confirm that Section 2401(b)'s time bar is a jurisdictional condition not subject to equitable tolling.

a. The plain text of the FTCA time bar is significant, even apart from its obvious historical roots in the 1863 and 1911 Acts. That text is straightforward and direct: It declares that "[e]very" untimely claim "shall be forever barred," and it contains no exceptions, caveats, or ambiguities. The "unusually emphatic form" Congress used to establish the time bar supports treating it as a strict requirement not subject to equitable tolling. *Brockamp*, 519 U.S. at 349-354.

That same text, of course, also attaches a specific jurisdictional *consequence* to delayed filings, stating that untimely claims "shall be forever barred." 28 U.S.C. 2401(b). Unlike other statutes of limitations that simply authorize a claim to be brought within a specific period, the FTCA provision goes a step further by requiring dismissal of such claims. See generally *Wong*, 732 F.3d at 1063-1068 (Bea, J. dissenting).[17] In commanding that such claims "shall be forever barred," the provision speaks to—and restricts—the "adjudicatory authority" of courts. *Reed*, 559 U.S. at 160-161 (citation omitted) (noting that "[j]urisdictional statutes speak to the power of the court") (citation omitted).

Indeed, this Court, in *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), recognized that the FTCA time bars constrain the authority of district courts. There, the Court identified Section 2401(b)'s "shall be forever barred" formulation as being "of a similar order" as a jurisdictional bankruptcy statute that "*confines re-*

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[17] See also *Irwin*, 498 U.S. at 94-95 (quoting 42 U.S.C. 2000e-16(c) (1988)) (within 30 days an employee "may file a civil action")). The *Irwin* Court recognized that "[a]n argument can undoubtedly be made" that the text of 28 U.S.C. 2501, providing that every untimely claim "shall be barred," is "more stringent" than the language in Section 2000e-16(c). 498 U.S. at 95. The Court was "not persuaded that the difference between them [wa]s enough to manifest a different congressional intent with respect to the availability of tolling." *Ibid.* This Court subsequently held in *John R. Sand & Gravel*, however, that the time bar in 25 U.S.C. 2501 is a jurisdictional limit not subject to waiver or tolling, and that *Irwin* had not overruled *Soriano*'s holding to that effect. 552 U.S. at 133-138. Because the operative language of the FTCA time bar was modeled on the virtually identical time bar applicable to Tucker Act claims, *Irwin* likewise does not affect the jurisdictional character of 28 U.S.C. 2401(b).

view [by the bankruptcy court] to 'matters to which any party has timely and specifically objected." *Id.* at 453 & n.8 (emphasis added). Significantly, the other statute *Kontrick* cited as being of a "similar order" to the bankruptcy statute that "confines review" to timely filings was 28 U.S.C. 2107, which this Court subsequently held in *Bowles* is jurisdictional and not subject to waiver or tolling. 540 U.S. at 453 n.8; see *Bowles*, 551 U.S. at 209-213.

b. The FTCA as originally enacted also expressly conditioned its grant of "exclusive jurisdiction" to district courts on the plaintiff's compliance with the time limitation for filing suit. FTCA § 410(a), 60 Stat. 843-844 (granting jurisdiction "[s]ubject to the provisions of this title"); FTCA § 420, 60 Stat. 845 ("this title" included the bar to filing after the statutory one-year period); see *Wong*, 732 F.3d at 1055-1056 (Tashima, J., dissenting). That cross-reference confirms that the 1946 Congress understood the time bar as a direct limit on the district court's jurisdiction.[18]

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[18] In *Wong*, the Ninth Circuit noted that Congress later separated the FTCA's jurisdiction-granting and time-bar provisions—and eliminated the cross-reference to the latter—when it recodified Title 28 in 1948. 732 F.3d at 1042-1044. But this Court has made clear that changes resulting from the 1948 recodification should not be given substantive significance in statutory interpretation. See, *e.g.*, *John R. Sand & Gravel*, 552 U.S. at 136; *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 225-226 (1957); see also 1948 Act § 33, 62 Stat. 991 ("No inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure * * * in which any * * * section is placed."); H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (noting that 1948 recodification "simplifies and restates" the existing FTCA time bars "without change of substance"). Indeed, Congress in 1948 likewise codified the time bar applicable to Tucker Act claims, 28 U.S.C. 2501, in a different chapter of Title 28

c. Although the operative text of the FTCA time bar tracks the corresponding text of the 1863 and 1911 Acts, the FTCA does not include the express provisions in those Acts *allowing* tolling in cases where the plaintiff suffered under a legal disability at the time of suit. See pp. 3-4, *supra*. That difference between the otherwise-similar provisions shows that Congress did not want even a limited form of tolling to apply to FTCA cases. See *Lorillard* v. *Pons*, 434 U.S. 575, 581-582, 585 (1978) (holding that Congress's "selective incorporation" of some aspects of one statutory scheme into a new statute "strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully" the relevant aspects of the original statute); see generally Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 190-192, 220-228 (2000) (Colella & Bain).

The absence of any tolling provision was "a deliberate choice, rather than an inadvertent omission." *United States* v. *Muniz*, 374 U.S. 150, 156 (1963). During the decades-long process of drafting the FTCA, several of the proposed bills contained either a "reasonable cause" exception to the time bar, a savings provision that tolled the time for filing an action during periods of disability (such as infancy or mental incompetency), or both.[19] As this Court concluded in

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(Ch. 165) from the statutory provision conferring jurisdiction on the Court of Claims, 28 U.S.C. 1491 (Ch. 91). Yet the Court still held in *John R. Sand & Gravel*, 552 U.S. at 133-136, that the Tucker Act time limit is jurisdictional.

[19] See S. 1043, 74th Cong., 1st Sess. §§ 1(c), 202(a) (1935); S. 1833, 73d Cong., 1st Sess. §§ 1(c), 202(a) (1933); S. 4567, 72d Cong., 1st

rejecting the argument that FTCA suits may not be brought by federal prisoners, the fact that any such exception is "absent from the [FTCA] itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills." *Ibid.* Ordinarily, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983).[20]

The legislative history also suggests that while Congress knew that the FTCA's strict time bar might be harsh in particular circumstances, it expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling. For example, Judge Alexander Holtzoff—a "major figure[] in the development of the [FTCA]," *Kosak* v. *United States*, 465 U.S. 848, 856 (1984), who was then serving as a special assistant to the Attorney General—testified that "[i]f unusual cases of hardship

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Sess. §§ 1(c), 202(a) (1932); H.R. 16429, 71st Cong., 3d Sess. §§ 22, 34 (1931); H.R. 15428, 71st Cong., 3d Sess. §§ 202(a), 304 (1930); S. 4377, 71st Cong., 2d Sess. §§ 202(a), 304 (1930); H.R. 9285, 70th Cong., 1st Sess. §§ 202(a), 304 (1928); S. 1912, 69th Cong., 1st Sess. §§ 202(a), 304 (1926) (as reported by the House Comm. on Claims); H.R. 6716, 69th Cong., 1st Sess. §§ 202(c), 305 (1926); see generally Colella & Bain 190-192, 220-228 (describing proposed bills).

[20] Over two decades later, the committee report on a bill proposing to add similar tolling provisions to Section 2401(b) suggested that the 1946 Congress omitted tolling in order "to allay the feelings of those who questioned the advisability of authorizing tort claims suits against the Government." H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969).

arise, the claimant may still have recourse to a private bill, over which the claims committees would have jurisdiction." *Tort Claims Against the United States: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 38 (1940).[21]

d. Finally, it is notable that in the period immediately following its enactment, the FTCA time bar was generally not understood to permit equitable tolling. Thus in 1947, Judge Benjamin Moore described that time bar in remarks given to the Fourth Circuit Judicial Conference (and later published in the *American Bar Association Journal*) as "peculiar[]"—and unlike other federal and state statutes of limitation—insofar as it "contain[ed] no saving clause or provision which would toll the statute where infants, insane persons, or others under disability are concerned." *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857, 860 (1947). Judge Moore acknowledged that tolling would not be available in such circumstances, stating "I know of no modern rule of construction whereby [such tolling] can be implied, especially where the right exists only by force of a statute." *Ibid.* In a similar commentary, Judge Leon R. Yankwich noted that "there is no jurisdiction

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[21] Accord *Tort Claims Against the United States: Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 21 (1940) (statement of Alexander Holtzhoff); see also 69 Cong. Rec. 2200 (1928) (statements of Reps. Bankhead & Underhill) (reflecting understanding that time limit would be strictly enforced and that in "isolated cases" of "hardship" where the claimants could not "confer with counsel or make arrangements about the bringing of a suit" because they live far away or are "in hospital for 8 or 10 or 12 months," their remedy would be to "come back to Congress [for a private bill]"); see generally Colella & Bain 191-194.

to entertain [an FTCA] action after the expiration of the period within which it might have been brought," that *Finn* and other cases establish that courts "interpreting statutes waiving governmental immunity" are "confined to the letter of the statute," and that no waiver of the FTCA limitations period is permissible. *Problems Under the Federal Tort Claims Act*, 9 F.R.D. 143, 153-154 (1949).

C. Events Following The FTCA's Enactment In 1946 Confirm That Section 2401(b) Is Jurisdictional And Not Subject To Equitable Tolling

As explained above, Congress did not intend the original 1946 version of the FTCA time bar to be subject to equitable tolling. That understanding has been confirmed over subsequent decades, including with respect to the two-year deadline for presenting a claim to the appropriate federal agency.

1. Congress addressed hardship cases by extending the suit-filing deadline in 1949

In 1949, Congress extended the suit-filing deadline to two years in order to prevent "unfair[ness]" in particular situations, such as when claimants "suffered injuries which did not fully develop until after the expiration of the period for making claim" or when a deceased tort victim's next of kin did not receive notice of the wrongful death within the statutory period. See H.R. Rep. No. 276, 81st Cong., 1st Sess. 3-4 (1949); S. Rep. No. 135, 81st Cong., 1st Sess. 2 (1949). The very enactment of the 1949 extension demonstrates that Congress retained, and was prepared to exercise, the authority to determine how to address possible hardships in the application of Section 2401(b)'s strict time limit.

Moreover, in the discussions leading up to the 1949 change, Representative John Gwynne briefly suggested the idea of addressing "hardship cases—where a person had a reasonable excuse for not observing the [time limit]"—by "amend[ing] the [FTCA] so the court might have some discretion" in applying the one-year statute of limitations. *To Extend the Time for Filing Claims Under the Federal Tort Claims Act: Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 80th Cong., 2d Sess. 27-28 (Mar. 10, 1948). A representative from the Justice Department dismissed that suggestion as not "practical." *Id.* at 28. Congress's decision to address possible instances of hardship by extending the time limit in the text of the statute itself underscores that Congress did not confer an extra-textual power to do so on the courts.

2. Congress reenacted Section 2401(b) in 1966 against the backdrop of* Soriano *and of decisions holding the FTCA time bar to be jurisdictional

In 1966, Congress revised the FTCA time bar by (1) requiring claimants to present their claims to the appropriate agency within two years, and (2) barring any suit not filed within six months of the agency's denial of the claim. 1966 Act §§ 2(a), 7, 80 Stat. 306, 307. In doing so, Congress also reenacted—without substantive amendment—the key operative language included in the original time limit. *Ibid.*; see 28 U.S.C. 2401(b) (providing that any untimely tort claim against the United States "shall be forever barred"). Three aspects of the 1966 legislation reinforce the conclusion that Congress understood the FTCA time bar to be jurisdictional and not subject to equitable tolling.

a. Congress enacted the 1966 revision of the FTCA against the backdrop of this Court's 1957 analysis in *Soriano*. As discussed above, *Soriano* held that Section 2501's virtually identical time bar must be strictly enforced without tolling. 352 U.S. at 275-276; pp. 30-32, *supra*. The Court explained—in language equally applicable to Sections 2501 and 2401(b)—that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." 352 U.S. at 276. The Court further noted its longstanding precedent establishing "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Ibid.* *Soriano* thus once again assured Congress of the settled doctrine that a statutory time limit with respect to suits against the government could not be tolled unless the statute said so expressly.

Congress also acted in 1966 against the backdrop of circuit and district court decisions uniformly holding the FTCA time limit to be a jurisdictional requirement not subject to waiver or tolling. For example, the Fifth Circuit had rejected equitable tolling of Section 2401(b) on the ground that the FTCA conditioned the government's waiver of sovereign immunity "upon the suit's being filed within the time fixed in the Act and not otherwise," thereby making "exact compliance with the terms of consent * * * a condition precedent to suit." *Simon* v. *United States*, 244 F.2d 703, 704 (1957); see *United States* v. *Croft-Mullins Elec. Co.*, 333 F.2d 772, 777 n.9 (5th Cir. 1964) (citing *Finn* and holding that "[s]ince the limitation was part of the statute creating the liability, the time is an indispen-

sable condition of the liability, whether limitations are pleaded or not"), cert denied, 379 U.S. 968 (1965).

Similarly, the Ninth Circuit had dismissed an FTCA case for lack of jurisdiction due to non-compliance with the time limit because "no waiver [of sovereign immunity] exists * * * once the two-year period of limitations has run." *Humphreys* v. *United States*, 272 F.2d 411, 412 (1959). And the Fourth Circuit had relied on this Court's interpretation of the Tucker Act time bar in *Munro* and *Finn* to hold that the FTCA time limit was not subject to waiver. *Anderegg* v. *United States*, 171 F.2d 127, 128 (1948) (per curiam), cert. denied, 336 U.S. 967 (1949).[22]

This Court has often emphasized that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580-581.[23] That principle applies here. If Congress had disagreed with *Soriano* or the uniform construction of Section 2401(b) by the

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[22] See also *Lomax* v. *United States*, 155 F. Supp. 354, 357-359 (E.D. Pa. 1957) (citing *Finn* and holding that FTCA time bar is not subject to waiver and that "it is not within the power of * * * this Court * * * to make exceptions thereto"); *Foote* v. *Public Hous. Comm'r of the U.S.*, 107 F. Supp. 270, 275-276 (W.D. Mich. 1952) (rejecting argument that tolling of Section 2401(b) time limit is available under express tolling provision in Section 2401(a)); *Whalen* v. *United States*, 107 F. Supp. 112, 113 (E.D. Pa. 1952) (same).

[23] See generally, *e.g.*, *Bragdon*, 524 U.S. at 645; *Cannon* v. *University of Chi.*, 441 U.S. 677, 696 (1979) (presuming that Congress was aware of circuit and district court interpretations of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, when it enacted similar language in Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373)).

lower courts, it surely would have said so. By reenacting the operative language without change, Congress ratified the uniform view that the time limits are jurisdictional requirements not subject to equitable tolling.

b. The 1966 legislation was originally drafted by the Department of Justice and communicated to Congress by Attorney General Nicholas deB. Katzenbach. H.R. Rep. No. 1532, 89th Cong., 2d Sess. 10-15 (1966); S. Rep. No. 1327, 89th Cong., 2d Sess. 2-3, 9-13 (1966). At the time, the Department's longstanding position—including in its *Soriano* brief and other filings—was that Section 2401(b)'s time limit was a jurisdictional condition on the waiver of sovereign immunity and not subject to tolling.[24] The Department would not have urged Congress to reenact the operative language of Section 2401(b)'s time bar if it had understood such language to *permit* tolling.[25]

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[24] See, *e.g.*, U.S. Supp. Br., at 41-45, *Soriano*, *supra* (No. 49); U.S. Br. in Opp. at 7, *Pittman* v. *United States*, 382 U.S. 941 (1965) (No. 578) (relying on *Soriano* and arguing that Section 2401(b) was not subject to tolling due to claimant's legal disability); see also *Kington* v. *United States*, 265 F. Supp. 699, 701 (E.D. Tenn. 1967) (noting government's argument that Section 2401(b) deprived court of jurisdiction over untimely claim), aff'd, 396 F.2d 9 (6th Cir.), cert. denied, 393 U.S. 960 (1968).

[25] Three years later, the Department confirmed its understanding that the FTCA time bar did not allow tolling. In a letter to the House Judiciary Committee addressing a bill that would have allowed tolling when the claimant suffered under a legal disability, Deputy Attorney General Richard Kleindienst noted the Department's longstanding position "in opposition to the tolling of the statute of limitation in tort claims against the United States" and argued that "[n]o special circumstances have been indicated which suggest a need for tolling the statute, and there are many considerations which clearly indicate that it would be most undesirable to

c. The 1966 Act was passed in tandem with a separate bill that created statutes of limitations for certain suits filed *by* the United States—and that expressly provided for tolling in particular circumstances. See Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304. Like the FTCA reenactment, that separate bill was also drafted by the Justice Department, and it was sent to Congress as part of the same communication from Attorney General Katzenbach. See H.R. Rep. No. 1534, 89th Cong., 2d Sess. 2-4, 7-8, 9-14 (1966). Congress considered the Justice Department's companion proposals "as a group," *id.* at 3, and it enacted the separate law on the same day that it amended the FTCA.

The companion statute-of-limitations law is instructive because—in contrast to the 1966 FTCA amendment—it contained a list of "Exclusions" expressly authorizing tolling of the time limits applicable to government-initiated suits in specific circumstances. Act of July 18, 1966, Pub. L. No. 89-505, sec. 1, § 2416, 80 Stat. 305. Those circumstances included (1) the defendant's absence from the country, (2) the defendant's temporary exemption from legal process due to "infancy, mental incompetence, diplomatic immunity, or for any other reason," (3) the lack of actual and constructive knowledge of facts material to the right of action by responsible government officials, and (4) a state of declared war. *Ibid.*

That separate law thus shows that when Congress wanted to authorize tolling of a statutory time limit, it did so explicitly by statute. Congress's decision not to

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do so." H.R. Rep. No. 629, 91st Cong., 1st Sess. 5-6 (1969) (reprinting Kleindienst letter and confirming that this also reflected the position communicated to Congress in 1967).

incorporate such provisions in the reenacted Section 2401(b) confirms that it did not want to permit tolling of the time bars.

3. Congress enacted numerous private laws "conferring jurisdiction" to hear FTCA claims "notwithstanding" Section 2401(b)

As explained above, Congress expected that claimants who failed to satisfy the FTCA's timing requirements could nonetheless pursue their claims by seeking private laws from Congress. See pp. 36-37, *supra*. After 1946, Congress repeatedly enacted private laws granting individual claimants the right to bring their otherwise untimely tort claims in court. Many of those private laws used language expressly confirming that Section 2401(d)'s time limits are jurisdictional.

The operative language of private laws enacted to revive untimely FTCA claims from the early 1950s to the mid-1980s commonly provided as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, *notwithstanding the provisions of section 2401 (b)* of title 28, United States Code, *jurisdiction is hereby conferred* upon the United States District Court for [a given district] to hear, determine, and render judgment on the tort claims of [the claimant] against the United States on account of personal injuries sustained on [a given date, and under particular stated circumstances].

Priv. L. No. 85-176, 71 Stat. A66 (1957) (emphases omitted and added).[26]

The text of those private laws confirms that Congress consistently viewed Section 2401(b) as a condition on the exercise of jurisdiction, and not as a run-of-the-mill statute of limitations subject to equitable tolling. If Section 2401(b) were nonjurisdictional, there would have been no reason for Congress to have "conferred" jurisdiction "*notwithstanding*" that provision.

Some of these private laws were enacted to revive claims that were jurisdictionally barred by Section 2401(b)'s deadline for filing suit in court, and others were enacted to revive claims barred by the deadline for presenting the claim to an agency.[27] Congress

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[26] See, *e.g.*, Priv. L. No. 96-30, 93 Stat. 1401 (1979) (virtually identical language granting "jurisdiction" "notwithstanding the time limitation of Section 2401(b) of title 28, United States Code"); Priv. L. No. 96-29, 93 Stat. 1400 (1979) (same); Priv. L. No. 91-116, 84 Stat. 2113 (1970) ("conferr[ing]" "jurisdiction" "notwithstanding the limitations of section 2401 of title 28, United States Code"); Priv. L. No. 91-109, 84 Stat. 2110 (1970) (same); Priv. L. No. 90-284, 82 Stat. 1403 (1968) (same); Priv. L. No. 85-184, 71 Stat. A70 (1957) (same); see also Priv. L. No. 99-15, 100 Stat. 4319 (1986) (granting "jurisdiction" to district court under 28 U.S.C. 1346 to hear tort claim "notwithstanding the two-year limitation set forth in section 2401(b) of title 28, United States Code"); Priv. L. No. 71, 65 Stat. A28 (1951) (granting "jurisdiction" to district court under 28 U.S.C. 1346 "despite section 2401 of title 28, United States Code"); Priv. L. No. 64, 65 Stat. A26 (1951) (same).

[27] For examples of private bills reviving claims barred by Section 2401(b)'s suit-filing deadline, see Priv. L. No. 91-109, 84 Stat. 2110 (1970); H.R. Rep. No. 58, 91st Cong., 1st Sess. 2-3 (1969); Priv. L. No. 90-284, 82 Stat. 1403 (1968); S. Rep. No. 376, 90th Cong., 1st Sess. 2-3 (1967). For examples of private bills reviving claims barred by the administrative-presentment deadline, see Priv. L.

therefore plainly recognized that *both* time limits established jurisdictional limits on the power of district courts to adjudicate FTCA claims.

This Court has emphasized that "subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Loving* v. *United States*, 517 U.S. 748, 770 (1996) (brackets and citation omitted).[28] Here, the private laws enacted over a number of decades treating Section 2401(b) as jurisdictional provide strong confirmation that neither of the FTCA time bars permit equitable tolling.

4. Congress consistently rejected proposals to authorize equitable tolling

After 1946, Congress repeatedly declined to enact bills to permit tolling even in circumstances where the claimant was under various forms of legal disability, such as minority, insanity, imprisonment, or the like.[29]

No. 96-30, 93 Stat. 1401 (1979); H.R. Rep. No. 460, 96th Cong., 1st Sess. 2 (1979); Priv. L. No. 96-29, 93 Stat. 1400 (1979); S. Rep. No. 461, 96th Cong., 1st Sess. 1-2 (1979).

[28] See, *e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228 (2010) (noting that a later-enacted statute can "clarify the understanding" of prior legislation); *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (noting that statutory provisions should be "construe[d] [] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law"); *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[29] See, H.R. 3261, 101st Cong., 1st Sess. (1989); H.R. 3260, 101st Cong., 1st Sess. (1989); H.R. 1023, 99th Cong., 2d Sess. (1986); H.R. 10575, 92d Cong., 1st Sess. (1971); H.R. 10124, 91st Cong., 1st Sess. (1969); H.R. 4155, 91st Cong., 1st Sess. (1969); H.R. 5713, 90th Cong., 1st Sess. (1967); H.R. 7184, 89th Cong., 1st Sess. (1965); H.R. 2403, 81st Cong., 1st Sess. (1949).

The history surrounding those proposed bills makes clear that Congress was well aware that Section 2401(b) did not permit equitable tolling in its existing form.

For example, the House Judiciary Committee report on a 1969 proposal emphasized (1) the contrast between the specific tolling provisions in Section 2401(a) and the absence of any such provision in Section 2401(b); (2) Congress's rejection of draft bills in the 1920s and 1930s that included tolling provisions; (3) two Ninth Circuit decisions rejecting the availability of tolling under Section 2401(b); and (4) the Justice Department's opposition to allowing the FTCA time bar to be tolled. H.R. Rep. No. 629, 91st Cong., 1st Sess. 3-4, 6 (1969). The report expressed the view that "the time is overdue for the recognition of the fact that persons suffering from legal disabilities * * * are actually being deprived of their rights because of the presently overstrict limitation provisions now found in [Section 2401(b)]." *Id.* at 4.

Years later, Deputy Assistant Attorney General Robert Willmore testified before Congress concerning a similar bill. He explained that the Department of Justice was "strongly opposed" to the bill, noting that similar tolling provisions had been proposed "on a number of occasions" in the past and that the Department had "consistently and repeatedly opposed such legislation." *Time Extension for Presenting Tort Claims to Persons Under Legal Disability: Hearing Before the Subcomm. on Administrative Law & Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 7 (1986).

Thus, like the private laws that treated Section 2401(b) as jurisdictional, the failed proposals to amend

Section 2401(b) to provide for equitable tolling—and the Executive Branch's consistent opposition to such proposals—still further reinforce the conclusion that Section 2401(b) does not permit tolling.

5. Congress in 1988 provided a narrow exception to Section 2401(b)'s time bars in one specific circumstance

In 1988, Congress did enact a provision allowing a form of tolling in one specific circumstance that was then arising with some frequency in FTCA litigation. Before this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988), lower courts had typically held that federal employees were absolutely immune from personal liability in state common-law tort actions arising from activities within the scope of their employment, thereby making the FTCA the only remedy in such circumstances. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988) (1988 House Report). But in many cases, claimants had sued private individuals in state court and only subsequently learned that the defendants were federal employees at the time they committed the alleged tort. By then, the FTCA's two-year time limit for presenting a claim to an agency had often expired. Without equitable tolling, such claimants were left without a remedy. See generally Colella & Bain 202-203.

This Court's 1988 *Westfall* decision limited the scope of a federal employee's immunity to circumstances where the employee was performing a discretionary function. 484 U.S. at 299. Congress responded by enacting the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, which overturned the *Westfall* decision and made the FTCA the

exclusive remedy for any torts allegedly committed by government employees within the scope of their employment. § 5, 102 Stat. 4564; 1988 House Report 4. The law also created a new procedure for (1) substituting the United States as the proper defendant in such cases and (2) granting the claimant 60 days in which to present an FTCA claim to the appropriate agency. Westfall Act § 6, 102 Stat. 4564; see 28 U.S.C. 2679(d)(2)-(4) and (5). Under the Westfall Act, if the agency denies the claim in those circumstances, the claimant may sue in court and his claim "shall be deemed to be timely presented under section 2401(b) of this title," but only if the claim "would have been timely had it been filed [with the agency] on the date the underlying civil action was commenced." 28 U.S.C. 2679(d)(5).

Congress's decision to grant tort claimants extra time in that limited scenario—but not in others—confirms its understanding that Section 2401(b) does *not* permit equitable tolling in other circumstances. Indeed, Congress passed the 1988 law at a time when the courts of appeals had consistently characterized Section 2401(b) as jurisdictional and had attached jurisdictional consequences to untimely filings.[30] At

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[30] See, *e.g.*, *Richman* v. *United States*, 709 F.2d 122, 124 (1st Cir. 1983); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210, 214 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Peterson* v. *United States*, 694 F.2d 943, 945 (3d Cir. 1982); *Childers* v. *United States*, 442 F.2d 1299, 1303 (4th Cir.), cert. denied, 404 U.S. 857 (1971); *Vernell* v. *USPS*, 819 F.2d 108, 111-112 (5th Cir. 1987); *Garrett* v. *United States*, 640 F.2d 24, 26 (6th Cir. 1981) (per curiam); *Charlton* v. *United States*, 743 F.2d 557, 558-559 (7th Cir. 1984) (per curiam); *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); *Anderberg* v. *United States*, 718 F.2d 976, 977 (10th Cir. 1983), cert. denied, 466 U.S. 939 (1984); *Maahs* v. *United States*,

no point since 1946 did Congress ever reject that established rule, which comports with the text, history, and purpose of Section 2401(b). See *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828 (relying on fact that Congress amended the relevant statute six times and left untouched a uniform judicial and administrative interpretation). This Court should enforce that rule here.

D. Additional Features Of The Two-Year Time Limit Underscore That Section 2401(b) Is Jurisdictional And May Not Be Equitably Tolled

For the reasons described above, both of Section 2401(b)'s time bars should be interpreted, together, as being jurisdictional requirements not subject to equitable tolling. This conclusion is confirmed by the text and role of the two-year deadline in Section 2401(b).

1. The FTCA's text provides strong support for treating the two-year deadline as jurisdictional. In imposing that deadline, the 1966 Act directly linked Section 2401(b) to 28 U.S.C. 2675(a), the provision establishing the mandatory requirement that a claimant first present a claim to the responsible agency and exhaust that process by affording the agency six months to act. This Court has recognized that Section 2675(a)'s presentment and six-month exhaustion requirements are themselves limitations on the jurisdiction of the courts. See *McNeil* v. *United States*, 508 U.S. 106, 109-113 (1993) (affirming dismissal for lack of jurisdiction where tort action was prematurely filed before expiration of six-month period following presentation of claim to the agency). It makes sense

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840 F.2d 863, 866 n.4 (11th Cir. 1988); *Sexton* v. *United States*, 832 F.2d 629, 633 & n.4 (D.C. Cir. 1987).

for Congress to have treated compliance with the two-year time limit for invoking that exhaustion process—and then the six-month deadline for filing suit in court after that process has been completed—as likewise conditions on the court's jurisdiction.

2. This Court has explained that "facilitating the administration of claims" is often an important hallmark of jurisdictional time bars. *John R. Sand & Gravel*, 552 U.S. at 133 (identifying this purpose as a "broader system-related goal"); see *Brockamp*, 519 U.S. at 352-353. The FTCA "governs the processing of a vast multitude of claims," and the government's "interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command," *McNeil*, 508 U.S. at 112, set forth in the time bar. See also Jayson & Longstreth § 1.01, at 1-8 (Dec. 2012) (estimating that 15,000-30,000 FTCA claims are presented to federal agencies each year, with 1500 additional claims filed in court).

The requirement that a claim first be presented to the appropriate agency allows the entity with the "best information" to "consider[]" and resolve the claim "without the need for filing suit and possibl[y] expensive and time-consuming litigation." See *McNeil*, 508 U.S. at 112 n.7 (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 3 (1966)). Strict adherence to the two-year deadline, like strict adherence to the presentment requirement itself, plainly facilitates the consideration of the great number of FTCA claims.

3. Practical considerations also demonstrate that Congress did not intend to allow courts to toll the two-year presentment deadline. Allowing equitable tolling of that requirement would put agencies in an awkward

and unfamiliar position when asked to consider a facially untimely claim. In such circumstances, the agency would have to choose among: (1) denying the claim outright as untimely (and thereby assuming the risk that a court might allow equitable tolling and then address the merits of the claim itself in the first instance); (2) investigating and evaluating a request for tolling (and thereby diverting the agency into facts unrelated to the merits of the claim and matters outside the agency's area of expertise); or (3) considering both tolling *and* the merits (and thereby potentially wasting agency time and resources and requiring consideration of factors Congress would not have considered relevant to the process for expeditious administrative settlement of claims on the merits).

Notably, if the agency chose the straightforward option of simply denying the claim as untimely—and if the court later found tolling appropriate—the agency would be denied the "fair opportunity to investigate and possibly settle the claim" and would have to "assume the burden of costly and time-consuming litigation." *McNeil*, 508 U.S. at 111-112. That result would directly undermine the FTCA's goal of giving the agency the first opportunity to address the substance of the claim. Congress did not intend to authorize an "'equitable tolling' exception" to the FTCA time limit that "could create serious administrative problems" such as forcing agencies "to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for 'equitable tolling' which, upon close inspection, might turn out to lack sufficient equitable justification." *Brockamp*, 519 U.S. at 352.

4. The *Irwin* presumption in favor of equitable tolling rests upon a "realistic assessment of legislative

intent," based on the fact that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" 498 U.S. at 95 (citation omitted). But there is no basis for assuming such a legislative intent with respect to the presentment deadline in Section 2401(b). After all, there was no customary practice of requiring private litigants to present administrative claims to government agencies before filing suit—let alone any practice of tolling statutory deadlines governing such presentment—when Congress enacted the two-year time limit in 1966. And the textual, policy, and practical considerations discussed above make it especially unlikely that Congress actually intended to grant courts authority to toll that time limit.

For these further reasons, the court of appeals erred in authorizing equitable tolling of the two-year time limit in 28 U.S.C. 2401(b). And because both the two-year deadline for presenting a claim to the agency and the six-month deadline for filing suit in court after exhaustion of that process are tied to the single operative phrase "shall be forever barred," these further reasons reinforce the conclusion that Section 2401(b) as a whole states mandatory prerequisites to the exercise of jurisdiction by the courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

2. 28 U.S.C. 2401 provides:

Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

3. 28 U.S.C. 2501 provides:

Time for filing suit

Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the Government Accountability Office fails to act within six months after receiving the account.

4. 28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

5. 28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial peti-

tion the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

* * * * *

6. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)), provides:

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided, further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

7. Judicial Code, ch. 231, § 156, 36 Stat. 1139 (1911), provides:

SEC. 156. Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues: *Provided*, That the claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

8. Federal Tort Claims Act, ch. 753, Tit. IV, 60 Stat. 842 (1946), provides in pertinent part:

TITLE IV—FEDERAL TORT CLAIMS ACT

* * * * *

PART 3—SUITS ON TORT CLAIMS AGAINST THE UNITED STATES

JURISDICTION

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission

complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

(b) The judgment in such an action shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted pursuant to this section upon a claim presented to any Federal agency pursuant to part 2 of this title unless such Federal agency has made final disposition of the claim: *Provided*, That the claimant may, upon fifteen days' notice given in writing, withdraw the

claim from consideration of the Federal agency and commence suit thereon pursuant to this section: *Provided further*, That as to any claim so disposed of or so withdrawn, no suit shall be instituted pursuant to this section for any sum in excess of the amount of the claim presented to the Federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of presentation of the claim to the Federal agency or upon evidence of intervening facts, relating to the amount of the claim. Disposition of any claim made pursuant to part 2 of this title shall not be competent evidence of liability or amount of damages in proceedings on such claim pursuant to this section.

* * * * *

PART 4—PROVISIONS COMMON TO PART 2 AND PART 3

ONE-YEAR STATUTE OF LIMITATIONS

SEC. 420. Every claim against the United States cognizable under this title shall be forever barred, unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later, an action is begun pursuant to part 3 of this title. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to part 3 of this title shall be extended for a period of six months from the date of mailing of notice to the claimant

by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 410 of this title, if it would otherwise expire before the end of such period.

* * * * *

9. Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304, provides in pertinent part:

* * * * *

§ 2416. Time for commencing actions brought by the United States—Exclusions

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

"2415. Time for commencing actions brought by the United States.

"2416. Time for commencing actions brought by the United States—Exclusions."

10. Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306, provides in pertinent part:

* * * * *

SEC. 2. (a) Subsection (a) of section 2675 of title 28, United States Code, is amended to read as follows:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this sub-section shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim."

(b) Subsection (b) of section 2675 of title 28, United States Code, is amended by deleting the first sentence thereof.

* * * * *

SEC. 7. Subsection (b) of section 2401 of title 28, United States Code, is amended to read as follows:

"(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

* * * * *

RESPONDENT'S BRIEF

No. 13-1075

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT MARLENE JUNE

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QUESTION PRESENTED

The Federal Tort Claims Act ("FTCA") permits a person injured by the negligence of a government employee to sue the government for damages in district court. It generally renders the government liable to the same extent that a similarly situated private party would be liable under relevant state law. From its outset, the FTCA has contained a time limit on filing suit. A 1966 amendment added a new prerequisite: Before filing suit, the victim must present her claim to the responsible federal agency within a certain period of time after it accrues, in order to allow the parties to explore informal settlement.

The question presented is:

In light of the presumption that Congress does not intend to disturb a district court's equitable power to toll the running of a statute of limitations, and given the lack of proof that Congress clearly intended to deprive district courts of this power with respect to the FTCA, whether a district court may under appropriate circumstances toll the FTCA's time limit on presenting administrative claims?

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. It was Defendant in the district court and was Appellee in the court of appeals.

Respondent is Marlene June, in her capacity as conservator for A.K.B., a minor child entitled under Arizona law to seek relief for the wrongful death of his father Anthony Booth. June was Plaintiff in the district court and was Appellant in the court of appeals.

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OPINIONS BELOW

The district court's opinion is unpublished. It is reprinted at Pet. App. 3a-12a.

The opinion of the court of appeals is unpublished. It is available at 2013 U.S. App. LEXIS 25,657 and is reprinted at Pet. App. 1a-2a.

JURISDICTION

The court of appeals issued its judgment on December 24, 2013. Pet. App. 1a. The government filed a timely petition for a writ of certiorari on March 7, 2014. That petition was granted on June 30, 2014. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act is spread across multiple chapters of Title 28 of the U.S. Code. One such provision, § 1346(b)(1), "United States as Defendant," located in Chapter 85, "District Courts; Jurisdiction," provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

> while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674, "Liability of the United States," located in Chapter 171, "Tort Claims Procedure," provides, in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Section 2401(b), "Time for Commencing Action Against United States," located in Chapter 161, "United States as Party Generally," provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

STATEMENT OF THE CASE

A. Congress Enacts the Federal Tort Claims Act to Permit Victims to Sue the Government for Its Employees' Tortious Conduct.

In 1946, Congress enacted the Federal Tort Claims Act ("FTCA" or "Act"). *See* Legislative Reorganization Act of 1946, ch. 753, tit. IV, 60 Stat. 842 ("1946 Act"). Before the passage of the Act, the government generally enjoyed "sovereign immunity" from tort suits. The FTCA, however, "waive[d] the Government's immunity from suit in sweeping language." *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951). It granted the federal district courts exclusive jurisdiction to adjudicate tort claims against the government "under circumstances where the United States, if a private person, would be liable ... in accordance with the law of the place where the [tortious] act or omission occurred." 1946 Act § 410(a), 60 Stat. at 843-44. And it directed courts to impose tort liability upon the government "in the same manner, and to the same extent as a private individual under like circumstances." *Id.* at 844. Thus, while matters of practice and procedure would be determined by the Federal Rules of Civil Procedure, 1946 Act § 411, 60 Stat. at 844, in nearly all other respects, the government would be treated as if it were a private party sued under relevant state law.

That general rule yielded only to a collection of highly particularized express exceptions, *see, e.g.*, 1946 Act § 421(a)-(l), 60 Stat. at 845-46, as well as

certain conditions, including a federal statute of limitations. In a section entitled "One-Year Statute of Limitations," Congress provided that "[e]very claim against the United States cognizable under [the FTCA] shall be forever barred ... unless within one year after such claim accrued ... an action is begun." *Id.* § 420, 60 Stat. at 845. Additionally, if the claim did not exceed $1000, a plaintiff could extend that time by first presenting her claim to the responsible agency within one year so that she and the agency could attempt to informally negotiate a settlement. *Id.* § 403(a), 60 Stat. at 843. If she did so, she then would have until six months after the conclusion of the informal administrative process (even if later than one year from accrual) in which to begin a court action. *Id.* § 420, 60 Stat. at 845.

Congress enacted this time limit against the backdrop of the "hornbook law" presumption that Congress does not intend to deprive a district court of its equitable power to toll the running of a statute of limitations in extraordinary circumstances. *Young v. United States*, 535 U.S. 43, 49 (2002) (citations omitted); *see infra* § I.A-B. Indeed, less than six months before Congress passed the FTCA, this Court repeated that unless Congress specifically prohibits equitable tolling, "[t]his equitable doctrine is read into every federal statute of limitations." *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946). The *Holmberg* case itself addressed tolling where "fraudulent conduct on the part of the defendant"—specifically, concealment of critical information from the plaintiff—"ma[d]e it unfair to [fault the plaintiff] because of mere lapse of time." *Id.* at 396. Significantly, Congress in the FTCA did not add any lan-

guage prohibiting equitable tolling of the statutory time limit in the case of concealment, or in any other extraordinary cases.

In 1948, two years into the life of the FTCA, Congress revised all of Title 28, which housed (and still houses) the FTCA. Act of June 25, 1948, ch. 646, 62 Stat. 869 ("1948 Act"). It was a "thorough revision." H.R. Rep. No. 80-808, at 4 (1947); S. Rep. No. 80-1559, at 1 (1948). In doing so, Congress carefully differentiated "provisions on jurisdiction" from those that instead "deal[t] with procedure." H.R. Rep. No. 80-808, at 5.

Substantively, the FTCA remained largely the same. It still gave the federal district courts exclusive jurisdiction to adjudicate tort claims against the government whenever a similarly situated private party would be liable under state law. 1948 Act, sec. 1, Ch. 85, § 1346(b), 62 Stat. at 933. It still directed those courts to impose liability upon the government to that same extent. *Id.*, Ch. 171, § 2674, 62 Stat. at 983. And it still contained the same statute of limitations. *Id.*, Ch. 161, § 2401(b), 62 Stat. at 971.

But, the revision clarified the FTCA considerably. Before the overhaul, all of the FTCA's various provisions, regardless of function, were placed together into Chapter 20 of Title 28 entitled "Federal Tort Claims." 9 U.S.C. ch. 20 (1946). The revision separated the provision granting district courts exclusive jurisdiction from the rest of the Act. Congress placed it in the newly created Chapter 85, entitled "District Courts; Jurisdiction." 1948 Act, ch. 646, sec. 1, Ch. 85, § 1346(b), 62 Stat. at 933. Con-

gress located the remaining provisions in new chapters 161, entitled "United States as Party Generally," and 171, entitled "Tort Claims Procedure." Congress clarified that the courts' exclusive jurisdiction was "subject to" only the provisions in Chapter 171.[1] *Id.* The FTCA's statute of limitations, however, was contained in Chapter 161. 1948 Act, Ch. 161, § 2401(b), 62 Stat. at 971.

Much of the FTCA has remained essentially constant since the 1948 overhaul. For example, the Act still grants district courts exclusive jurisdiction to hear tort suits against the government whenever a private party would be liable under state law in like circumstances. 28 U.S.C. § 1346(b)(1). And the Act still renders the government liable as if it were a private party under state law, as well. *Id.* § 2674.

Congress, however, tinkered with the administrative claims process and the statute of limitations several times. In 1949, it granted victims an extra year from accrual (two rather than one) in which to sue straightaway. Act of Apr. 25, 1949, ch. 92, § 1, 63 Stat. 62, 62. It also permitted (but did not require) the victim to seek informal administrative recourse within two years for claims of up to $1000, and gave the victim until six months after the disposition of that claim to sue. *Id.* In 1959, Congress

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[1] Although the 1948 Act purported to make the grant of exclusive jurisdiction subject to the provisions of chapter "173," in reality there was no such chapter, and Congress quickly corrected the scrivener's error. Act of Apr. 25, 1949, ch. 92, § 2(a), 63 Stat. 62, 62.

raised that $1000 cap, allowing that extra time to sue when victims presented timely administrative claims of up to $2500. Act of Sept. 8, 1959, Pub. L. No. 86-238, 73 Stat. 471, 472.

B. Congress Amends the FTCA to Require That a Victim Present an Administrative Claim Before Suing.

In the mid-1960s, Congress enacted a series of remedial statutes requiring victims of certain unlawful conduct to seek informal administrative relief before filing suit in district court. One example was Title VII of the Civil Rights Act of 1964. Pub. L. No. 88-352, 78 Stat. 259. It permitted victims of employment discrimination to sue their employers in federal court. *Id.* § 706(e)-(f), 78 Stat. at 260-61. But it required them to first pursue informal administrative relief within a certain time after the discrimination occurred. *Id.* § 706(d), (e), 78 Stat. at 260. After that, they would have a fixed window of time in which to sue. *Id.* § 706(e), 78 Stat. at 260. Title VII did not expressly authorize a district court to grant case-specific equitable tolling of either time limit, but nothing in the statute prohibited it either. Consistent with the longstanding presumption that Congress does not lightly interfere with a district court's equitable tolling powers, this Court has explained that both time limits associated with Title VII suits permit equitable tolling. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (suit-filing time limit); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (administrative charge-filing time limit).

In 1966, Congress likewise amended the FTCA to create a structurally similar regime. No longer could victims sue straightaway within two years of accrual. As with Title VII, they had to pursue informal administrative resolution in the first instance for all claims (regardless of amount sought). Act of July 18, 1966, Pub. L. No. 89-506, § 2(a), 80 Stat. 306, 306. But, also as with Title VII, the lawsuit would be plenary in nature. It would not be an "appeal" of the resolution of the administrative process.

Congress revised the statute of limitations to account for this new administrative requirement:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing ... of notice of final denial of the claim by the agency to which it was presented.

Id. § 7, 80 Stat. at 307.

These 1966 amendments remain in force today. 28 U.S.C. § 2401(b).

C. The Government Prevents June from Presenting a Timely Administrative Claim.

This case involves a tort claim seeking recovery for the death of Anthony Booth. He died because the Federal Highway Administration ("FHWA"), an agency within the U.S. Department of Transporta-

tion, permitted a defective cable median barrier to be installed on a stretch of Interstate 10 in Arizona.

Cable median barriers are a vitally important component of highway safety. A cable median barrier consists of steel wire ropes mounted on flexible posts laid out along the median of a highway that divides traffic traveling in one direction from traffic traveling in the other. *See* FHWA, *Median Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/median_barriers/median_barriers.pdf (last visited Nov. 4, 2014). When properly installed, the barrier is expected to prevent a vehicle that loses control from straying into oncoming traffic and causing a head-on collision or at least diminish the force of a collision. *See id.* The cable median barrier does this by flexibly redirecting the vehicle back into its lane or at least absorbing most of the energy of a crash. *See id.* Properly functioning cable median barriers are so effective that they have reduced cross-median crash fatalities by more than 90 percent. *See* FHWA, *Cable Barriers*, http://safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/ctrmeasures/cable_barriers/cable_barriers.pdf (last visited Nov. 4, 2014).

In 2000, the FHWA permitted the installation of a cable median barrier along a stretch of Interstate 10 in Phoenix. J.A. 142-43. At the time of installation, the barrier had not passed the FHWA's required "crashworthiness" testing. *Id.* Indeed, it had not even been crash tested. *Id.* And the FHWA knew this. *Id.* at 145-46.

On February 19, 2005, Laquitha Green was driving a car on that same stretch of Interstate 10, with Booth as a passenger. *Id.* at 143-44. Green lost control of the car and hit the cable median barrier. *Id.* But the barrier neither redirected the car nor did it appreciably absorb the energy of a crash. *See id.* The vehicle crossed into oncoming traffic and collided with another vehicle. *Id.* Booth and Green both died of injuries sustained in the crash. *Id.*

In August 2005, that same cable median barrier that failed to protect Booth and Green on Interstate 10 was crash tested. *Id.* at 145. It failed. *Id.* In September 2005, the FHWA issued a public memorandum incorrectly representing that Interstate 10's cable median barrier had been approved as crashworthy. *Id.* at 145-46. The FHWA, however, knew this was false. *Id.*

Shortly thereafter, Respondent Marlene June, as conservator for Booth's minor child A.K.B., filed a wrongful-death action against the state of Arizona in state court. *Id.* at 26-33. During that and related state court litigation, June's counsel sought to depose certain FHWA personnel in order to determine whether the cable median barrier was functioning properly. *Id.* at 146. The FHWA refused to make them available for over two years. *Id.*

It was not until April 2009 that the FHWA finally made those employees available for deposition. *Id.* June's counsel learned for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite

never having passed the FHWA's crashworthiness testing. *Id.*

June began the process of seeking relief against the government pursuant to the FTCA. On December 20, 2010, June presented a wrongful-death administrative tort claim to the FHWA as required by the FTCA. *Id.* at 148. In March 2011, the FHWA via certified mail issued a final denial of June's administrative claim. *Id.* at 149.

D. The Court of Appeals Holds That the Time Limit on Presenting Administrative Claims Can Be Equitably Tolled in Extraordinary Cases.

In May 2011, within six months of that final denial, June filed this lawsuit against the government. *Id.* at 117.

The government moved to dismiss on the ground that the district court lacked subject-matter jurisdiction. It contended that the time limit for presenting administrative claims was jurisdictional and that June missed that deadline. *Id.* at 128-36. Specifically, the government argued that June's claim accrued on February 19, 2005, the date of Booth's fatal accident, but noted that June did not present her administrative claim to the FHWA until December 20, 2010. *Id.*

June contended that the court had jurisdiction and that the two-year time limit should be equitably tolled. She sought leave to file an amended complaint that detailed how the FHWA had concealed

the defective condition of the cable median barrier that contributed to Booth's death. *Id.* at 152-61. And she argued that her claim was timely presented because she presented it within two years of when she learned about it in April 2009. *Id.*

The district court denied leave to amend the complaint, granted the government's motion, and dismissed the case. Pet. App. 3a-12a.

The court of appeals reversed. *Id.* at 1a-2a. The court explained that the FTCA's six-month time limit for filing suit in federal court may be equitably tolled in appropriate circumstances. *Id.* at 2a. On that basis, it held that the FTCA's two-year time limit for presenting administrative claims also can be equitably tolled in certain situations. *Id.* It remanded the case to the district court. *Id.*

SUMMARY OF ARGUMENT

I. A. Congress has long been presumed to intend that federal district courts retain their historic equitable power to toll the running of statutes of limitations in extraordinary circumstances. This Court has recognized the presumption going back more than a century, especially where a defendant has concealed critical information from the plaintiff. *See, e.g.*, *Bailey v. Glover*, 88 U.S. 342, 348-49 (1875). Periodically—including less than six months before Congress passed the FTCA—it has issued unambiguous reminders to Congress, reiterating that federal legislation concerning time limits will be interpreted with the presumption in mind.

The presumption is not just venerable, but strong. District courts will not be divested of their historic equitable power to toll federal time limits unless the clearest evidence indicates that Congress meant to do so. An equivocal legislative record will not suffice. Neither will silence.

B. As this Court held in *Irwin v. Department of Veterans Affairs*, "the same rebuttable presumption" in favor of the district courts retaining their equitable tolling power applies "in the same way" in suits against the government. 498 U.S. 89, 95-96 (1990). The Court reasoned that this "is likely to be a realistic assessment of legislative intent." *Id.* at 95.

Irwin contradicts the government's argument here that Congress likely would not want to preserve a district court's historic equitable tolling power in cases against the government. That is what *Irwin* was all about. It likewise contradicts the government's argument here that the rule articulated in *Irwin* applies only to post-*Irwin* legislation. After all, the Court in *Irwin* itself applied the rule to legislation enacted before the decision was issued.

In arguing otherwise, the government leans chiefly upon cases like *Soriano v. United States*, 352 U.S. 270 (1957), addressing the time limit applicable to suits under the Tucker Act in the Court of Claims (now called the Court of Federal Claims). The Court of Claims, however, traditionally had no equitable powers. Accordingly, those decisions have no bearing on the rule to be applied to time limits—like the FTCA's time limit on presenting administrative claims—to be administered by district courts, which

have a long and rich tradition of exercising equitable power, including the power to toll statutes of limitations in extraordinary circumstances.

II. A. Congress has never rebutted the presumption in favor of a district court's retention of its equitable tolling powers with respect to the FTCA's time limit on presenting administrative claims. Proving such a rebuttal would require clear evidence either that Congress intended the time limit to be jurisdictional, or that Congress intended the time limit, while non-jurisdictional, nevertheless to categorically preclude equitable tolling. The government cannot show either.

Congress has expressed no clear intent to make the administrative presentment time limit jurisdictional. This Court has held that the provision containing the time limit does not bear on district courts' jurisdiction under the FTCA. The language and structure of the statute itself—which received careful study, especially as to matters of jurisdiction, and which were subject to a "scientific" revision in 1948 to increase precision and clarity, H.R. Rep. No. 80-808, at 1 (1947)—make this evident. Nothing in the time limit refers to jurisdiction, and nothing in the provision related to jurisdiction refers to the time limit.

Further confirming the non-jurisdictional nature of the time limit on administrative presentment is the FTCA's express command that tort suits against the government track tort suits against private parties under state law. Nationwide, state tort law regularly treats applicable time limits as non-

jurisdictional and regularly recognizes the power of a trial court to toll the running of a statute of limitation.

Once again, the government's reliance on cases interpreting the Tucker Act time limit administered by the Court of Claims for the contrary position is unavailing. Linguistically, the time limits do appear similar. But critically, the contexts in which they are applied are anything but. As explained earlier, the Court of Claims did not traditionally exercise equitable power. District courts, by contrast, always have done so. This Court long ago rejected the argument the government makes here attempting to link a district court's power under the FTCA to the power of the Court of Claims under the Tucker Act.

B. The FTCA's language, structure, purpose, and legislative history do not provide the clear intent necessary to override the district courts' historic equitable tolling power. To the contrary, they are all fully consistent with an intent not to disturb a district court's traditional equitable tolling powers.

1. As noted, the FTCA expressly provides that tort suits against the government emulate tort suits against private parties under state law. Generally, such state law has long permitted case-specific tolling of time limits. That alone is powerful evidence that Congress wanted the FTCA's timing provisions—including the time limit on presenting administrative claims—to permit equitable tolling, as well.

This analysis is unaffected by other rules Congress adopted regarding the submission of a claim.

Simply put, none reveals a clear intent to prohibit district courts from exercising their historic power to equitably toll time limits in exceptional, especially deserving, individual cases. Moreover, drawing such an inference would be inconsistent with the very notion of a presumption of equitable tolling. The presumption means that this is not an area where this Court needs to read tea leaves. If Congress wants to prohibit a district court from exercising its historic equitable tolling power and to overcome the more-than-a-century-old presumption, it knows how to say so, and it knows that it has to say so clearly.

2. The FTCA's core purpose and legislative history are fully consistent with a district court's retention of its historic equitable tolling power. As this Court's decisions have noted, the FTCA's purpose and legislative history support interpreting the Act with fairness and equity to tort claimants. Courts should not act "as ... self-constituted guardian[s] of the Treasury" in interpreting the statute. *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955). That principle applies with extra strength in regard to the administrative claim presentment time limit. The administrative process established by Congress is permeated with a claimant-friendly informality that is highly compatible with the exercise of equitable tolling to mitigate unfair results.

ARGUMENT

I. CONGRESS IS PRESUMED TO HAVE INTENDED THAT DISTRICT COURTS RETAIN THEIR HISTORIC POWER OF EQUITABLE TOLLING WHEN APPLYING THE FEDERAL TORT CLAIMS ACT'S TIME LIMIT ON PRESENTING ADMINISTRATIVE CLAIMS.

When enacting a statute of limitations, Congress is presumed not to disturb a district court's traditional equitable tolling power. *Infra* § I.A. That presumption applies equally where the government is the defendant, including to the FTCA's administrative presentment deadline enacted in 1966. *Infra* § I.B.

A. There Is a Venerable Presumption in Favor of Reading Statutes of Limitations to Preserve a District Court's Inherent Equitable Tolling Power.

"Equitable tolling" is "a doctrine that pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotation marks omitted). The presumption is that "[e]quitable tolling is applicable to statutes of limitations." *Id.* This presumption is consistent with the function that statutes of limitations serve. *Id.* "[T]heir main thrust is to encourage the plaintiff to pursue his rights diligently." *Id.* (internal quotation

marks and alteration marks omitted). So "[w]hen an extraordinary circumstance prevents him from bringing a timely action, the restriction imposed by the statute of limitations does not further the statute's purpose." *Id.* (internal quotation marks omitted). The plaintiff *has* "pursue[d] diligent prosecution of known claims," but a sufficiently formidable obstacle stood in his way. *Id.* Thus, equitable tolling is not an exception to a limitations statute, but "seeks to vindicate ... the genuine intent of the statute." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia J., dissenting on other grounds).

"[T]he doctrine of equitable tolling is centuries old," having been "reflected in Blackstone's Commentaries two-thirds of the way through the eighteenth century." *Id.* at 1941 (internal quotation marks omitted). It is particularly venerable in the context of a defendant's concealment of critical information. For example, nearly 140 years ago, in *Bailey v. Glover*, 88 U.S. 342 (1875), a creditor sued a debtor for improperly transferring property out of his estate in order to prevent the creditor from obtaining it in a bankruptcy proceeding. *Id.* at 346, 348-49. The relevant statute of limitations, enacted in 1867, provided that "no suit ... shall in any case be maintained ... unless brought within two years." *Id.* at 349. The plaintiff did not sue, however, until after that time had elapsed. *See id.* at 348-49. The defendant had hidden the transaction, so that the plaintiff did not discover it in time. *Id.* This Court allowed the suit. *Id.* at 349-50. It held that "in equity ... the authorities are without conflict in support of the doctrine that where

the ignorance ... has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief." *Id.* at 347. No language in the statute expressly barred the district court from employing its ordinary equitable power to vindicate that doctrine. *Id.* at 349. Accordingly, the court retained its inherent equitable power.

Nearly a century ago, this Court formally enshrined the rule as a presumption that statutes of limitation do not disturb a district court's traditional equitable power to toll the running of the limitations period. *Exploration Co., Ltd. v. United States*, 247 U.S. 435, 448-49 (1918). Citing an unbroken line of cases that had followed *Bailey*, this Court noted that "the rule of *Bailey v. Glover* [had become] the established doctrine of this Court" and "has been approved and followed." *Id.* It held that it would regard any time limit enacted after *Bailey*—i.e., after 1875—as "presumably enacted with the ruling of that case in mind." *Id.* Fraudulent concealment would toll the time limit where there was "no good reason why the rule, now almost universal, ... should not apply." *Id.*

Less than six months before Congress first passed the FTCA, this Court again reaffirmed that district courts are presumed to retain their equitable tolling powers. The Court recited the doctrine that "[e]quity will not lend itself to ... fraud and historically has relieved from it. It bars a defendant from setting up ... a fraudulent defense." *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946). The Court declared that unless Congress provides otherwise,

"[t]his equitable doctrine is read into every federal statute of limitations." *Id.* at 397; *TRW v. Andrews*, 534 U.S. 19, 27 (2001) ("*Holmberg* ... stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment ....").

Shortly before Congress's 1966 addition of the administrative presentment requirement and time limit at issue in this case, this Court reaffirmed the longstanding presumption in favor of a district court's retention of its equitable tolling powers. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234 (1959). The Court recited the equitable principle "that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage." *Id.* at 234. And the Court declared that, in such a case, this principle would bar a statute-of-limitations defense when there is "nothing in the language or history of the [relevant statute] ... to indicate that this principle of law ... was not to apply." *Id.*

This Court has since followed this presumption in a dizzying array of cases.[2]

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[2] *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645-46 (2010) (petition-filing time limit in Antiterrorism and Effective Death Penalty Act of 1996); *Young v. United States*, 535 U.S. 43, 49-51 (2002) (petition-filing time limit in Bankruptcy Act, as amended in 1966, is subject to equitable tolling); *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000) (suit-filing time limit in

The presumption is not easily overcome. Congress, of course, is always free to insert language into its statutes of limitations expressly prohibiting equitable tolling. Absent that, however, to overcome the presumption that a district court retains that power, a defendant must show that Congress's intention to remove that power was clear.

A defendant can do this in one of two ways. First, the defendant can rebut the presumption by showing a "clear indication" from Congress that the time limit is jurisdictional and actually constrains the adjudicatory power of the district court. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). Second, it can do so by demonstrating "the clearest command" that Congress intended for the time limit, while non-jurisdictional, nevertheless to preclude a district court from exercising its equitable tolling powers. *Holland v. Florida*, 560 U.S. 631, 646 (2010). Whichever route the government takes (and

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Clayton Act as amended in 1955, as later adopted for use as suit-filing time limit in civil Racketeer Influenced Corrupt Organizations Act, is subject to equitable tolling); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997) (same); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983) (suit-filing time limit in Title VII of Civil Rights Act of 1964 is subject to equitable tolling); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (administrative charge-filing time limit in Title VII of Civil Rights Act of 1964 is subject to equitable tolling, and the same result would obtain as to the administrative charge-filing time limits in National Labor Relations Act as amended in 1947 and Age Discrimination in Employment Act of 1967); *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 426 (1965) (suit-filing time limit in Federal Employers Liability Act, as amended in 1939, is subject to equitable tolling).

here, it tries both), the *contents* of that proof must meet a single demanding clear-statement standard. This imperative follows from the more general proposition that a district court's equitable power "is not to be denied or limited in the absence of a clear and valid legislative command." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

B. "The Same Rebuttable Presumption" Applies "in the Same Way" Against the Government, Including to the FTCA Administrative Presentment Deadline Enacted in 1966.

1. The presumption described above carries over jot-and-tittle to a district court's equitable powers in an action brought against the federal government. In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court addressed a district court's equitable tolling authority when facing a Title VII action for money damages brought against a federal agency. This Court declared that "[t]he *same* rebuttable presumption of equitable tolling applicable to suits against private defendants ... appl[ies] to suits against the United States." 498 U.S. at 95-96 (emphasis added). Moreover, the Court added, the presumption that a district court retains its equitable tolling powers applies "against the Government[] *in the same way* that it is applicable to private suits." *Id.* at 95 (emphasis added).

In *Irwin*, the Court recognized that in suits against the government, there is the added consideration of sovereign immunity. This Court observed

that all suits against the government are necessarily premised on a waiver of sovereign immunity and "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Id.* (quotation marks omitted). But this consideration does not change the general presumption that district courts retain their equitable tolling powers. This is because "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.*

Irwin also confirms that the presumption applies with equal force whether the statute of limitations imposes a deadline for filing a complaint in court or for presenting a claim with an agency as a prerequisite to suing. The Court articulated the presumption as applying "to suits." 498 U.S. at 96. And it characterized both suit-filing deadlines and administrative-presentment prerequisite deadlines as "statutory time limits applicable to lawsuits" to which the presumption applies. *Id.* at 95; *id.* at 95 n.2 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)). Unsurprisingly so, as both deadlines are interpreted and applied by district courts—tribunals with historic equitable power.

Irwin's reference to *Zipes* is particularly telling here. That was the case mentioned above (at 7) in which the Court held that the administrative charge-filing time limit in Title VII of the Civil Rights Act of 1964 permits case-specific equitable tolling. The Court in *Zipes* also stated that the same result would obtain as to the administrative charge-filing time limit in the Age Discrimination in Employment

Act of 1967. 455 U.S. at 394. The provisions of those statutes requiring victims to seek informal administrative relief before filing suit were enacted roughly contemporaneously (1964 and 1967, as compared with 1966) with the similarly structured time limit at issue here. *Supra* 7-8.

2. The government's response to all this is slippery. It begins with an apparent concession: "In recent years, this Court has adopted a rebuttable presumption that federal statutes of limitation requiring that suits be filed in court by a certain time—including those applicable to suits against the United States—are subject to equitable tolling." Pet. Br. 15-16 (citing *Irwin*, 498 U.S. at 95-96). And much of its brief seems to accept that some form of presumption does apply and thus tries to rebut it. *See id.* at 16-53. In other places, however, the government suggests that "*Irwin*'s background presumption ... does not govern this case" at all. *Id.* at 27 n.12. And even where it purports to apply a presumption, the government treats this presumption as no presumption at all. Instead of looking for a clear intent to deprive the district courts of their traditional equitable tolling power, the government seems to demand affirmative proof that Congress actively wanted to empower district courts to exercise that historic function. *See, e.g., id.* at 53 (asserting that equitable tolling should be denied across the board because it is "unlikely that Congress actually intended to grant courts authority to toll that time limit").

The government's half-hearted embrace of the presumption appears to be premised in part on the

fact that the FTCA contains a waiver of sovereign immunity. For example, in arguing that the presumption does not apply in full, the government contends: "Congress understood the FTCA time bar as jurisdictional in significant part *because* it operated as a limit on the waiver of sovereign immunity to monetary claims against the United States." Pet. Br. 27 n.12. That, however, is exactly the argument that the government made, and this Court rejected, in *Irwin*, when the Court held that sovereign immunity concerns are *not* a basis for rejecting the presumption. That the government does not get special treatment vis-à-vis equitable tolling simply because it is the government is what *Irwin* was *all about*.[3]

The government also argues that the presumption is inapplicable to statutes passed before *Irwin*, asserting: "It may be that after *Irwin*, this Court would not ... apply [a] categorical rationale to any *new statute* waiving immunity for claims against the United States," but not to statutes enacted in an earlier "era," back when Congress supposedly "did not

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[3] This goes double in the context of the FTCA, because the time limit on administrative presentment is not a component of the waiver. *"[Section] 1346(b)* ... waives the sovereign immunity of the United States for certain torts committed by federal employees." *Smith v. United States*, 507 U.S. 197, 201 (1993) (emphasis added). The FTCA's time limits, by contrast, are located in § 2401(b). They are mere "condition[s]" on that waiver. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Thus, permitting district courts to equitably toll the FTCA's deadlines involves no broadening of the waiver whatsoever, not even the "little" bit that *Irwin* found unobjectionable and insufficient to alter Congress's presumed intent.

expect its silence to be taken as implicit consent to equitable tolling." *Id.* at 32 (emphasis added). To the contrary, the presumption that applies in this case is not of recent vintage. Rather, as we have demonstrated (at 18-20), it is a deeply entrenched presumption that goes back more than a century.

The government's chief support for weakening or suspending the presumption is a line of cases purporting to discern Congress's intent regarding equitable tolling of time limits administered by the Court of Claims (now called the Court of Federal Claims). In particular, the government notes that in *Soriano v. United States*, 352 U.S. 270 (1957), the Court held that the six-year time limit on filing non-tort suits for money damages in the Court of Claims under the Tucker Act cannot be equitably tolled. Pet. Br. 30-32. And it asserts that Congress would have expected *that result*—the prohibition of tolling—to be the default.

This Court rejected that very argument when the government made it 25 years ago in *Irwin*. Like the government's first *Irwin* re-tread, this one, too, does not improve with age. The statute at issue in *Irwin* was the Civil Rights Act *of 1964*. And this Court applied the presumption to a statute of limitations that Congress added in *1972*, which was still 18 years before *Irwin*. That alone conclusively defeats the government's position here. Moreover, in *Irwin*, Justice White adopted the argument in his concurrence disagreeing with the majority on the difference between suits against the government and suits against private parties. Justice White argued that previously "the presumption was, as set forth in

Soriano ..., that statutes of limitations for suits against the Government were *not* subject to equitable tolling." 498 U.S. at 99 n.2. He concluded that it was "unlikely that the 1972 Congress had in mind" what he characterized as "the Court's present departure from that [supposed] longstanding rule." *Id.* And he accused the Court's decision of "directly overul[ing] ... *Soriano*." *Id.* at 98. The majority, however, was unpersuaded.

And for good reason. As mentioned above, *Soriano* is one of a line of cases that interprets the time limit governing actions in the *Court of Claims*. That court is very different from district courts in respects that bear critically on the issues in this case.

The Court of Claims is a tribunal that from inception has exercised only the most limited jurisdiction. At first, it did not have the power even to issue binding judgments, but simply issued recommendations to Congress. *See* Act. of Feb. 24, 1855, ch. 122, §§ 1, 7, 10 Stat. 612, 613. Even after Congress granted the Court of Claims the power to issue binding judgments, Congress heavily circumscribed its jurisdiction. This Court said that "[t]he matters made cognizable therein include nothing which inherently or necessarily requires judicial determination." *Ex parte Bakelite Corp.*, 279 U.S. 438, 453 (1929). It regarded the Court of Claims as merely "an incident of [Congress's] power to pay the debts of the United States." *Id.* at 452. Apart from some very narrow, very recent exceptions not relevant here, "'the Court of Claims has'" always had "'no power to grant equitable relief.'" *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988) (quoting

Richardson v. Morris, 409 U.S. 464, 465 (1973)); *see United States v. Denedo*, 556 U.S. 904, 912 (2009) ("Th[e] rule [that Congress determines the jurisdiction of the federal courts] applies with added force to Article I tribunals ... which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution.").

In contrast, federal district courts have a "long tradition of equity practice." *Romero-Barcelo*, 456 U.S. at 320. That tradition extends to the exercise of equitable principles *against* the government. This Court has always presumed that Congress intends to preserve those historic powers. "Absent the clearest command to the contrary from Congress, federal courts retain their equitable power." *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979) (applying presumption against government in Social Security Act as amended in 1939). "[W]hen Congress desire[s] to make ... an abrupt departure from traditional equity practice ..., it ... ha[s] [to] ma[k]e its desire plain." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944).

To put it succinctly, "[t]he Claims Court does not have the general equitable powers of a district court." *Bowen*, 487 U.S. at 905. Accordingly, as this Court has recently reaffirmed, "ordinary legal principle[s]" concerning statutes of limitations "'*ha[ve] no application to suits in the Court of Claims against the United States.*'" *John R. Sand & Gravel*, 552 U.S. 130, 135 (2008) (quoting *Finn v. United States*, 123 U.S. 227, 232-33 (1887)) (emphasis added by *John R. Sand & Gravel Co.*). It emphasized the uniqueness of the Court of Claims, noting that "[o]ver the years, the Court has reiterated in various

contexts this or similar views about the more absolute nature of the [C]ourt of [C]laims limitations statute." *Id.* Even the government has highlighted and relied upon this uniqueness before this Court. Reply Brief for the Petitioner at 18, *U.S. Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999) (No. 97-1642) ("When it vests jurisdiction over certain causes of action (contract suits) in a court that lacks authority to grant equitable relief [(the Court of Claims)], the natural conclusion is that Congress intended such relief to be barred.").

For that reason, *Irwin*'s refusal to accord *Soriano* and like cases across-the-board talismanic significance to *all* statutes of limitations makes perfect sense. Those cases represent Congress's attitude specifically as to time limits in the Court of Claims.[4] It may make some sense to withhold a presumption in favor of equitable tolling from time limits administered by tribunals with no equitable power. But the Tucker Act cases do not represent Congress's intent as to time limits administered by district courts, which have a rich tradition of using equity to prevent unfair results. *That* intent is what *Irwin* decided. In doing so, it did not overrule *Soriano* or any other decision involving the Court of Claims. *John*

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[4] The Tucker Act time limit also applies to a limited category of low-dollar-value non-tort claims against the government for money damages that may be heard in district court as well as the Court of Federal Claims. But Congress was careful to provide that district courts in such situations essentially sit as satellite branches of the Court of Federal Claims, exercising jurisdiction "concurrent with" that court. 28 U.S.C. § 1346(a)(2).

R. Sand & Gravel Co., 552 U.S. at 137 (explaining that "*Irwin* ... does not imply revisiting past precedents" involving time limits in the Court of Claims).

The time limit at issue here (though it concerns presentation of claims to administrative agencies) is administered in FTCA lawsuits by federal district courts. Thus, the presumption of equitable tolling fully applies.

II. NOTHING IN THE FTCA EXHIBITS A CLEAR INTENT TO STRIP DISTRICT COURTS OF THEIR HISTORIC POWER OF EQUITABLE TOLLING.

Given *Irwin* and the long-established presumption in favor of a district court retaining its equitable tolling authority, the question here is whether Congress issued "a clear and valid legislative command" to the contrary regarding the FTCA's time limit on presenting administrative claims. *Romero-Barcelo*, 456 U.S. at 313. Congress did not. Contrary to the government's primary contention, the statute bespeaks no intention to treat the deadline as jurisdictional. *Infra* § II.A. And contrary to the government's backup position, the FTCA's language, structure, purpose, and legislative history do not clearly contradict—and indeed strongly support—the conclusion that Congress intended to preserve the district courts' customary equitable tolling power. *Infra* § II.B.

A. Congress Expressed No Clear Intent to Make the FTCA's Deadline for Presenting Administrative Claims Jurisdictional.

The government's lead argument is that § 2401(b)'s deadline for administrative presentment is jurisdictional. That assertion could not overcome the presumption unless Congress gave a "clear indication" of its intention to make the time limit jurisdictional. *Henderson*, 131 S. Ct. at 1203. Moreover, the government must establish that clear command *as to the time limit on presenting administrative claims, specifically*. It is not enough to prove that Congress intended to preclude equitable tolling of the six-month time limit for filing suit after the denial of an administrative claim. That in itself would not ipso facto prove that the time limit on presenting administrative claims prohibits equitable tolling simply because both are housed together and serve the same general function as time limits. *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975) ("Section 405(g) specifies [three] requirements for judicial review .... The second and third of these ... are waivable .... [T]he first requirement, however, [is] central to the requisite grant of subject-matter jurisdiction ...."); *see also Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2014) ("A requirement [this Court] would otherwise classify as nonjurisdictional ... does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." (citing *Gonzalez v. Thaler*, 132 S. Ct. 641, 651-52 (2012))); *Gonzalez*, 132 S. Ct. at 651 ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdiction-

al hurdle."). If anything, however, Congress has clearly indicated the time limit on presenting administrative claims is *not* jurisdictional.

1. In *FDIC v. Meyer*, 510 U.S. 471 (1994), this Court explained exactly what about the FTCA is jurisdictional. It said that "Section 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." *Id.* at 477 (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)) (alteration in *Meyer*). This category "includes" any claim that is:

> [1] against the United States, [2] for money damages, ... [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (quoting 28 U.S.C. § 1346(b)(1)) (alterations in *Meyer*). Clarifying the point, the Court reiterated that "[a] claim comes within this jurisdictional grant ... if it alleges the six elements outlined above." *Id.* That is, satisfaction of those six elements is sufficient to confer jurisdiction.

That six-element list does *not* include the FTCA's time limits. In particular, it does *not* include the time limit on presenting administrative claims.

Thus, facially untimely claims may still come within district courts' jurisdiction.

2. The holding in *Meyer* is consistent with how this Court has always approached the jurisdictional-or-not inquiry. To start with the obvious, the Court "ha[s] rejected the notion that 'all mandatory prescriptions, however emphatic, are ... properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Reg.*, 558 U.S. 67, 82 (2009)). "Among the types of rules that should not be described as jurisdictional are what [this Court] ha[s] called 'claim-processing rules'": "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at specified times." *Id.* at 1203. Directly on point, "[f]iling deadlines ... are quintessential claim-processing rules." *Id.* From the get-go, all signs point against the FTCA's time limit on presenting administrative claims being jurisdictional.

The FTCA's structure reinforces this conclusion. Section 2401, entitled "Time for Commencing Action Against United States," contains the time limit on administrative presentment. It says nothing about jurisdiction. The jurisdictional provision (§ 1346(b)(1)), entitled "United States as Defendant," says nothing about time limits (much less the particular time limit at issue here)—not even a cross-reference to that section. And the two provisions are located far away from each other in Title 28 of the U.S. Code. Specifically, the jurisdictional provision is located in Chapter 85, "District Courts; Jurisdic-

tion," while the timing provision is located in Chapter 161, "United States as Party Generally."

This Court confronted the same structural attributes in *Zipes* and relied upon them heavily in "holding compliance with the filing period [for administrative charges] to be not a jurisdictional prerequisite to filing a Title VII suit." 455 U.S. at 398. Specifically, the Court indicated that it rested its conclusion largely on the observations that (1) "[t]he provision granting district courts jurisdiction contains no reference to the timely-filing requirement"; (2) "[the time limit] does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts"; and (3) "[t]he provision specifying the time for filing ... with the [administrative agency] appears as an entirely separate provision" from the one granting jurisdiction. 455 U.S. at 393-94.

The FTCA presents an even more compelling case against finding the time limit on administrative presentment to be jurisdictional. This is because the time limit on presenting administrative claims is also isolated from the provision delineating the liability district courts should impose in FTCA cases. The liability provision, entitled "Liability of United States," is § 2674, which resides in Chapter 171, entitled "Tort Claims Procedure."

This distant placement of the jurisdictional provision was no accident. The 1948 revision "was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study," including "[f]ive years of Congressional attention." *Ex parte Collett*, 337 U.S. 55, 65 (1949). Congress over-

hauled the FTCA according to a "scientific plan" designed in part to clarify precisely what purpose each of Title 28's many provisions served. H.R. Rep. No. 80-808, at 1 (1947). In doing so, Congress carefully differentiated "provisions on jurisdiction" from those that instead "deal[t] with procedure." *Id.* at 5. Indeed, the former special counsel to the House Committee on Revision of the Laws said that he was "proudest of the way the [revised] code deals with jurisdiction ... and procedure." *Revision of Titles 18 and 28 of the U.S. Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 44 (1947) (statement of John F.X. Finn).

Congress did not enact the administrative presentment time limit until 1966, nearly 20 years after the ink had dried on the 1948 revision. If Congress wanted to single out this new time limit and make sure it would be accorded jurisdictional status, Congress readily could have done so. But of course, Congress did not.

The government (at 34-35 & n.18) urges the Court to ignore the current structure of the FTCA—the structure Congress passed more than 60 years ago as the embodiment of a "scientific plan" by Congress to differentiate jurisdiction and procedure, H.R. Rep. No. 80-808, at 1, and the structure into which Congress in 1966 inserted the time limit on presenting administrative claims. The government proposes that the Court should focus exclusively on the structure and language of the original 1946 enactment, which was on the books for only two years. This, the government says, is because "changes re-

sulting from the 1948 recodification should not be given substantive significance" because it just "simplifies and restates" the original content. Pet. Br. 34 n.18 (quotation marks and citation to legislative history omitted).

But to focus on the text as recodified is not to infer substantive change from the recodification. Rather, it is simply to recognize that, as a result of the "close and prolonged study" that went into the revision—study that began before the original 1946 enactment—the revised text more clearly expresses what Congress's intent was all along.

Moreover, the original 1946 enactment does not suggest that the timing provision is jurisdictional, either. The government contends that the 1946 statute "expressly condition[ed] its grant of 'exclusive jurisdiction' ... on the plaintiff's compliance with the time limitation for filing suit." Pet. Br. 34. This, the government asserts, is because the 1946 enactment "grant[ed] ... jurisdiction 'subject to the provisions of this title'"—"this title" being Title IV of the Legislative Reorganization Act of 1946, i.e., the undifferentiated whole of the FTCA, including the suit-filing deadline. *Id.*

That is absurd, as it would render every word of the 1946 FTCA jurisdictional. That legislation also required plaintiffs to follow the Federal Rules of Civil Procedure. But if the cross-reference had jurisdictional import, then a district court would lose adjudicatory authority every time a victim failed to get the caption on her complaint letter-perfect, *see* Fed. R. Civ. P. 10(a) (1937), failed to organize her

complaint using numbered paragraphs throughout, *see* Fed. R. Civ. P. 10(b) (1937), or made a minor error in noticing a deposition, *see* Fed. R. Civ. P. 27(b) (1937). No rational Congress could have intended that.

Thus, the 1946 FTCA, even taken on its own terms, could not have vested the timing provision with jurisdictional significance. It simply confirms that the jurisdictional provision's blunderbuss cross-reference to the undifferentiated whole of the FTCA was an "ambiguity" that "had been removed" during Congress's careful 1948 revision. S. Rep. No. 80-1559, at 2 (1948).

3. Among the provisions that the 1948 recodification preserved were two sections that conclusively demonstrate that Congress did not intend for the time limit on presenting administrative claims to receive jurisdictional treatment. As it did from its inception, the FTCA currently provides that the government can be sued in any case "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), and will be "liable ... in the same manner and *to the same extent* as a private individual under like circumstances," *id.* § 2674 (emphasis added); *see Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 68 (1955) (FTCA generally "compensate[s] the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable"). There is no dispute that applicable time limits generally would not be jurisdictional in a private suit under state

law. The states have interpreted their time limits this way going back centuries. *See, e.g.*, *Braun v. Sauerwein*, 77 U.S. 218, 223 (1870); *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (Story, J., riding circuit). Nor is there any dispute that they generally do so now, as well.

The government's argument for jurisdictional status is thus a request to have its liability measured in a *different manner* and to a *different extent* than a private individual under like circumstances—in defiance of the plain statutory text.

4. Instead of grappling with these explicit statutory commands, the government's main argument for treating the provision as jurisdictional revolves around a single phrase: "forever barred." The argument boils down to the following syllogism: (1) the Court has held the time limit on filing suit in the Court of Claims under the Tucker Act to be jurisdictional; (2) that time limit says that an action is "forever barred" if the defendant misses the deadline; (3) the FTCA's time limit on presenting administrative claims uses that same phrase; ergo (4) that deadline must also be jurisdictional. Pet. Br. 18-22.

Here, again, the government is misreading this Court's Tucker Act/Court of Claims cases as having anything to do with statutes other than the Tucker Act and tribunals other than the Court of Claims. For one thing, unlike the FTCA, "[t]he Tucker Act contains no ... language expressing Congress' intent to waive sovereign immunity such that the government can be sued to the same extent as a 'private person.'" *Fed. Ins. Co. v. United States*, 29 Fed. Cl.

302, 306 (Fed. Cl. 1993). Moreover, as discussed above (at 26-30), the Tucker Act time limit is administered by the Court of Claims—a tribunal long recognized as having nothing like a district court's equity power.

These peculiarities have always done the heavy lifting in this Court's Tucker Act/Court of Claims cases—not the "forever barred" language. None of the opinions issued on the "*six* separate occasions" in which the Court has held that time limit to be jurisdictional (Pet. Br. 19) contain anything approaching a linguistic analysis of "forever barred." Three of them—*Munro v. United States*, 303 U.S. 36 (1938), *United States v. Wardwell*, 172 U.S. 48 (1898), and *United States v. New York*, 160 U.S. 598 (1896)—do not even quote the language at all. And the most recent opinion, *John R. Sand & Gravel Co.*, may as well have been labeled "dubitante." 552 U.S. at 139 (noting that the Court would be reluctant to reconsider the holding even though "[it] might believe that decision is no longer 'right'").

Nothing about the phrase "forever barred" bespeaks jurisdiction. While the government describes this language as "emphatic," Pet. Br. 32—indeed, "unusually" so, *id.*—it is just a description of the consequence of blowing the statute of limitations. Once the statute of limitations has run, barring some sort of "revival" procedure, the action, by definition, is "forever barred." Thus, at bottom, all that the time limit at issue here does is pair a deadline with a consequence of failing to meet that deadline. Such a formulation "is unexceptional." *Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002). It

is an entirely commonplace formulation of garden-variety—i.e., non-jurisdictional—statutes of limitations.[5]

In this way, the FTCA's time limit on presenting administrative claims is no more emphatic than many other statutes of limitations that have been held to be not only non-jurisdictional but subject to equitable tolling. The statute in *Bailey*, which said "*no suit* at law or in equity shall *in any case* be maintained ... unless brought within two years," is one example. 88 U.S. at 349 (petition-filing time limit from Bankruptcy Act of 1867) (emphasis added). Another is the time limit in *Glus*, which provided that "*[n]o action* shall be maintained ... unless commenced within three years from the day the cause of action accrued." 359 U.S. at 232-34 (suit-filing time limit from Federal Employers' Liability Act as amended in 1939) (emphasis added).

There certainly is no magic in the particular word "forever" used to set forth the consequence of failing to meet the deadline. For proof, one need look no further than *Rotella v. Wood*, 528 U.S. 549 (2000). The Court there confronted a statute of limitations

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[5] *See* 927 (6th ed. 1990) (defining "statute of limitations" as "[a] statute ... declaring that no suit shall be maintained on such causes of action ... unless brought within a specified period after the right accrued"); *Black's Law Dictionary* 835 (5th ed. 1979) (same); *Black's Law Dictionary* 1077 (4th rev. ed. 1968) (same); *Black's Law Dictionary* 1077 (4th ed. 1957) (same); *Black's Law Dictionary* 1120 (3d ed. 1933) (same); *Black's Law Dictionary* 729 (2d ed. 1910) (same); *Black's Law Dictionary* 1122 (1st ed. 1891) (same).

providing that "[a]ny action to enforce any cause of action ... *shall be forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (suit-filing time limit for civil RICO, judicially adopted from suit-filing time limit under Clayton Act) (emphasis added). This Court found this statute consistent with "the understanding that federal statutes of limitations are generally subject to equitable principles of tolling." 528 U.S. at 560 (citing *Holmberg*, 327 U.S. at 397); *see also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997) (determining certain circumstances necessary "to toll the [same] limitations period" pursuant to "the doctrine of fraudulent concealment"). Thus, it is simply not true that the "forever barred" language in the FTCA's time limit on administrative presentment indicates a clear intent to bar a district court from employing equitable tolling in exceptional circumstances to pause the running of a limitations period.

5. The government asserts that the "legislative history establishes that Congress intended the FTCA to serve as the tort-claim analogue to the Tucker Act and thus confirms that the 'shall be forever barred' language in the FTCA time bar is likewise a jurisdictional limitation," including with respect to the time limit on presenting administrative claims. Pet. Br. 22; *id.* at 23 (citing H.R. Rep. No. 79-1287, at 5 (1945); H.R. Rep. No. 77-2245, at 9 (1942)). Once again, however, this Court has already rejected that exact argument.

More than 60 years ago, in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), the government "attempt[ed] to restrict [the FTCA's] scope" by "re-

view[ing] its legislative history" for references to a supposed intent to track the Tucker Act. In that case, *the exact same pages of the exact same reports as here* "[we]re relied upon by the Government ... as assimilating the proposed jurisdiction of the District Courts under the Federal Tort Claims Act to their existing jurisdiction under the Tucker Act." *Id.* at 550 n.8 (citing H.R. Rep. No. 79-1287, at 5; H.R. Rep. No. 77-2245, at 9).

This Court rejected the government's argument. It observed that these "statements ... were entirely omitted from even the sectional analysis of the measure when in 1946 it was incorporated into the Reorganization Bill and the report on it was made by the Senate Committee on the Organization of Congress." *Id.* Accordingly, the Court determined that "[t]he[se] views expressed in the earlier legislative history ... lose force by their omission from the 1946 report and discussion." *Id.* "Recognizing such a clearly defined breadth of purpose for the [FTCA] as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit," the Court found these statements insufficient to support the government's attempt "to whittle it down by refinements." *Id.* at 550. Nothing has changed since then.

6. Finally, the government cites to private bills passed after the FTCA was enacted wherein Congress permitted courts to hear claims they had deemed to be time-barred, and recited that it was giving the courts "jurisdiction" to do so. In the first place, Congress's mere decision to revive such claims says nothing about the jurisdictional status of the

time limit on administrative presentment. That Congress decided to revive a claim that a *court* deemed time-barred does not compel the conclusion that *Congress* believed that the time bar was jurisdictional. It only demonstrates that the court in that instance thought that the deadline was not met.

That Congress occasionally used the word "jurisdiction" in doing so does not change the analysis. Congress was all over the map on this. Some private bills reviving untimely claims mention "jurisdiction" with respect to the suit-filing time limit only (and not the time limit on presenting administrative claims), *see, e.g.*, Priv. L. No. 99-18, 100 Stat. 4320, 4320-21 (1986). Others mention "jurisdiction" only with respect to the amount in controversy, *see, e.g.*, Priv. L. No. 82-71, 65 Stat. A28, A28-A29 (1951). And still others do not mention "jurisdiction" at all. *See, e.g.*, Priv. L. No. 94-55, 90 Stat. 2977, 2977 (1976); Priv. L. No. 86-296, 74 Stat. A27, A27 (1960); Priv. L. No. 84-772, 70 Stat. A124, A124 (1956); Priv. L. No. 84-280, 69 Stat. A97, A97 (1955); Priv. L. No. 82-19, 65 Stat. A9, A9-A10 (1951).

That Congress over time has used the term "jurisdiction" inconsistently in reference to private bills reviving untimely claims merely confirms that no inference can be drawn from those bills one way or the other. And with respect to such bills enacted after 1966, it proves that there is much wisdom behind this Court's observation that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960).

B. The FTCA's Language, Structure, Purpose, and Legislative History Indicate No Intent—Let Alone a Clear Intent—to Override the District Courts' Historic Equitable Tolling Power.

Far from indicating a clear intention to overcome the presumption of equitable tolling, every tool of statutory construction indicates that Congress intended the FTCA to reinforce it. The government has the burden of proof. But all the evidence in fact indicates that Congress affirmatively intended to preserve the district courts' historic power to equitably toll federal time limits in exceptional cases.

1. The FTCA's language and structure favor equitable tolling.

Let us start with the plain language. As noted above (at 37-41), the wording of the limitation does not indicate any intent to abolish equitable tolling, but other statutory language affirmatively indicates an intention to retain it. In that regard, we have already noted the statutory command that the government is subject to liability in circumstances "where ... a private person[] would be liable to the claimant in accordance with *the law of the place* where the act or omission occurred," 28 U.S.C. § 1346(b)(1) (emphasis added), and that the government "shall be liable ... in the same manner and *to the same extent* as a private individual under like circumstances," *id.* § 2674 (emphasis added).

There are several ramifications to Congress's decision to fashion FTCA suits against the government

to mimic suits against private parties under relevant state law. State law generally has long permitted tolling of applicable time limits in suits against private parties. This is especially true with respect to tolling on the grounds of the defendant's deception. Justice Story, surveying this area of the law in 1828, lauded equitable tolling on the ground of the defendant's misconduct as "an implied exception" to prevent such time limits from "becom[ing] an instrument to encourage fraud." *Sherwood*, 21 F. Cas. at 1307. "[A]s far as I know," he observed, "the doctrine pervades the courts of law throughout this Union." *Id.* Such state law tolling is pervasive today, as well.[6] And there is no doubt that the rele-

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[6] *See, e.g.*, *Gallant v. MacDowell*, 759 S.E.2d 818, 821 n.5 (Ga. 2014) (recognizing "the tolling of the statute of limitations resulting from fraudulent concealment"); *Rolwing v. Nestle Holdings, Inc.*, 437 S.W.3d 180, 184 (Mo. 2014) ("[R]ecognized equitable tolling principles apply when the plaintiff was prevented from timely filing suit by the defendant's actions ...."); *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1261 (Ind. 2014) ("[A] tortfeasor's fraudulent concealment of his wrong ordinarily will operate to toll the statute of limitation ...."); *Minn. Laborers Health & Welfare Fund v. Granite Re, Inc.*, 844 N.W.2d 509, 514 (Minn. 2014) ("[T]he equitable doctrine of fraudulent concealment ... can toll the limitations period."); *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 772 (Del. 2013) ("[T]he principle of equitable tolling compels the conclusion that [the plaintiff's] delay was reasonable."); *Gonzales v. S.W. Olshan Found. Repair Co., LLC*, 400 S.W.3d 52, 58 (Tex. 2013) ("The doctrine of fraudulent concealment tolls limitations because a person cannot be permitted to avoid liability for his actions by deceitfully concealing wrongdoing until limitations has run."); *Aryeh v. Canon Bus. Solutions, Inc.*, 292 P.3d 871, 875 (Cal. 2013) ("The doctrine of fraudulent concealment tolls the statute of limitations where a defendant,

through deceptive conduct, has caused a claim to grow stale."); *Jett v. Wooten*, 110 So.3d 850, 856 (Ala. 2012) ("Alabama does recognize that a fraudulent concealment by a defendant tolls the running of the statute ...."); *In re Estate of Davis*, 308 S.W.3d 832, 841 (Tenn. 2010) ("[I]n considering general statutes of limitation, there is a recognized ... exception not voided in the statutes and which tolls the statute where, due to fraudulent concealment, a plaintiff is unaware of his cause of action."); *Whitaker v. Limeco Corp.*, 32 So.3d 429, 436 (Miss. 2010) ("Fraudulent concealment of a cause of action tolls its statute of limitations."); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 687 S.E.2d 29, 32 (S.C. 2009) ("[I]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations."); *Kaplan v. Morgan Stanley & Co.*, 987 A.2d 258, 264 (Vt. 2009) ("Equitable tolling applies ... where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit ...."); *Masquat v. DaimlerChrysler Corp.*, 195 P.3d 48, 54-55 (Okla. 2008) ("Fraudulent concealment constitutes an implied exception to the statute of limitations, and a party who wrongfully conceals material facts and thereby prevents a discovery of ... the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute, the purpose of which is to prevent wrong and fraud."); *Gore v. Myrtle/Mueller*, 653 S.E.2d 400, 405 (N.C. 2007) (stating that statute-of-limitations defense may fail where defendant engages in "[c]onduct which amounts to a false representation or concealment of material facts"); *Ross v. Louise Wise Servs., Inc.*, 868 N.E.2d 189, 198 (N.Y. 2007) (explaining that statute-of-limitations defense may fail "if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action"); *Snyder v. Love*, 153 P.3d 571, 573 (Mont. 2006) ("[A]s a general rule, a statute of limitations is tolled by a defendant's fraudulent concealment ... because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud."); *DeLuna v. Burciaga*,

857 N.E.2d 229, 245 (Ill. 2006) ("[F]raudulent concealment will toll a limitations period ...."); *Aiello v. Aiello*, 852 N.E.2d 68, 81 n.25 (Mass. 2006) ("[O]ur doctrine of fraudulent concealment provides for tolling of the limitations period in [certain] circumstances."); *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, 279 (Ohio 2006) (suggesting that statute-of-limitations defense may fail if "[the plaintiff's] cause of action was ... concealed from him" by the defendant's wrongful conduct); *Macomber v. Travelers Prop. & Cas. Corp.*, 894 A.2d 240, 251 (Conn. 2006) (recognizing "equitable tolling by fraudulent concealment"); *Williams v. Williams*, 129 P.3d 428, 432 (Alaska 2006) ("A party who fraudulently conceals from a plaintiff the existence of a cause of action" may be unable to succeed on a statute-of-limitations defense.); *Andres v. McNeil Co.*, 707 N.W.2d 777, 786 (Neb. 2005) ("[T]he doctrine of fraudulent concealment may render a statute of limitations defense unavailable."); *Blea v. Fields*, 120 P.3d 430, 437 (N.M. 2005) (recognizing "the ... concept of fraudulent concealment for tolling a statute of limitations"); *Fine v. Ceccio*, 870 A.2d 850, 860 (Pa. 2005) ("[T]he doctrine of fraudulent concealment serves to toll the running of the statute of limitations."); *Price v. N.J. Mfrs. Ins. Co.*, 867 A.2d 1181, 1185 (N.J. 2005) ("[U]nder varying circumstances we have recognized that tolling of the statute of limitations is the fair and responsible result, because the unswerving mechanistic application of statutes of limitations would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing the legislative purposes."); *Carter v. Haygood*, 892 So.2d 1261, 1268 (La. 2005) (explaining that courts are allowed "to weigh the equitable nature of the circumstances in each individual case to determine whether [the limitation period] will be tolled"); *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 684 N.W.2d 864, 876 (Mich. 2004) (holding that "[t]he equities of this case" preclude a statute-of-limitations dismissal because "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion ... rather than a negligent failure to preserve her rights"); *Muhammed v. Welch*, 675 N.W.2d 402, 408-09 (N.D. 2004) (stating that statute-of-limitations defense may fail where defendant "allegedly

concealed [critical facts] from the plaintiff"); *Jensen v. IHC Hosps., Inc.*, 82 P.3d 1076, 1093 (Utah 2003) ("[W]e did not modify the common law principle of fraudulent concealment that may be used to toll a statute of limitations."); *Purdy v. Fleming*, 655 N.W.2d 424, 431 (S.D. 2002) ("We have previously held that fraudulent concealment may toll the statute of limitations."); *Johnson v. Newport Cnty. Chapter for Retarded Citizens, Inc.*, 799 A.2d 289, 293 (R.I. 2002) ("[W]e recognize that, in appropriate circumstances, equitable tolling may serve as an exception to the statute of limitations ...."); *Rieff v. Evans*, 630 N.W.2d 278, 298 (Iowa 2001) ("We recognize that fraudulent concealment can toll the applicable statute of limitations."); *Shelton v. Fiser*, 8 S.W.3d 557, 561 (Ark. 2000) ("Fraudulent concealment suspends the running of the statute of limitations ...."); *Millay v. Cam*, 955 P.2d 791, 797 (Wash. 1998) ("[T]his court allows equitable tolling when justice requires."); *Cevenini v. Archbishop of Washington*, 707 A.2d 768, 773 (D.C. 1998) ("When the party claiming the protection of the statute of limitations has employed affirmative acts ... to fraudulently conceal ... the existence of a claim ..., such conduct will toll the running of the statute."); *Smith v. Boyett*, 908 P.2d 508, 512 (Colo. 1995) ("[W]e have consistently recognized fraudulent concealment as a basis for tolling statutes of limitation."); *Conrad v. Hazen*, 665 A.2d 372, 376 (N.H. 1995) ("The doctrine of fraudulent concealment is an equitable ground to justify the tolling of the statute of limitations based on the wrongful conduct of the defendant."); *Newberg v. Hudson*, 838 S.W.2d 384, 390 (Ky. 1992) ("[W]e have repeatedly held that a false representation or fraudulent concealment will toll the statute of limitations."); *Miller v. Romero*, 413 S.E.2d 178, 180 (W.Va. 1991) ("Fraudulent concealment on the part of the [defendant] will ... extend the .... statute of limitations."); *Leibert v. Fin. Factors*, 788 P.2d 833, 835 (Haw. 1990) (holding that lower court did not err "in tolling the statute of limitations on grounds of fraudulent concealment"); *Geisz v. Greater Baltimore Med. Ctr.*, 545 A.2d 658, 669 (Md. 1988) ("[F]raud or fraudulent concealment of the cause of action operates to toll the substantive limitations period in [certain] statute[s]."); *Olson v. A.H. Robins Co.*, 696

vant state here permits case-specific tolling. *See, e.g., Hosogai v. Kadota*, 700 P.2d 1327, 1331-32 (Ariz. 1985).

P.2d 1294, 1299 (Wyo. 1985) (stating that a party cannot "rely[] upon the statute of limitations" when "conduct of [that] party ... induces ... a fraudulent concealment of the facts necessary to a cause of action"); *Hosogai v. Kadota*, 700 P.2d 1327, 1331 (Ariz. 1985) ("The equitable tolling doctrine is rooted in a number of common law exceptions to statutes of limitations, including: defendant's fraudulent concealment of a cause of action ...."); *Copeland v. Desert Inn Hotel*, 673 P.2d 490, 492 (Nev. 1983) ("recogni[zing] ... the doctrine of equitable tolling"); *Twin Falls Clinic & Hosp. Bldg. v. Hamill*, 644 P.2d 341, 344 (Idaho 1982) (recognizing that statute-of-limitations defense may fail if defendant made "a false representation or concealment of a material fact with actual or constructive knowledge of the truth"); *Boykins Narrow Fabrics Corp. v. Weldon Roofing & Sheet Metal, Inc.*, 266 S.E.2d 887, 890 (Va. 1980) (recognizing that "[f]raudulent concealment ... consist[ing] of affirmative acts of misrepresentation" may in some situations "relieve the bar of the statute [of limitations]"); *Friends Univ. v. W.R. Grace & Co.*, 608 P.2d 936, 941 (Kan. 1980) (observing that "concealment of a cause of action" can in some circumstances "toll[] the statute of limitations"); *Bozzuto v. Ouellette*, 408 A.2d 697, 699 (Me. 1979) ("It is true that a defendant's fraudulent concealment from a plaintiff of the existence of a cause of action tolls the statute."); *Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422, 432 (Wis. 1976) (observing that "fraudulent[] conceal[ment]" may preclude the "assert[ion] [of] the statute of limitations"); *Nardone v. Reynolds*, 333 So.2d 25, 32 (Fla. 1976) ("[T]he equitable principle of fraudulent concealment will be utilized to toll the statute of limitations ...."); *Chaney v. Fields Chevrolet Co.*, 503 P.2d 1239, 1241 (Or. 1972) (subscribing to "the majority rule" that "fraudulent concealment of a cause of action from the one in whom it resides by the one against whom it lies constitutes an implied exception to the statute of limitations").

"[T]he[] words [directing FTCA suits to mimic suits against private parties under applicable state law] mean what they say." *United States v. Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. § 1346(b)(1)). In particular, the "law of the place" means "the whole law of the State where the act or omission occurred," not just random swatches of it. *Richards*, 369 U.S. at 11. As is evident from this language, the FTCA "was designed to build upon the legal relationships formulated and characterized by the States." *Id.* at 7. Where Congress "has not provided a specific and definite answer in [the] [A]ct" regarding a particular issue, state law controls. *Id.* at 11. A judge-made rule that would "set the courts completely adrift from state law" does not. *Id.*

This is all the more reason to enforce with extra vigor the presumption that Congress intends to maintain the district courts' historic equitable tolling power. Congress opted to use its own statute of limitations, including the time limit on presenting administrative claims, and thus surely intended for equitable tolling to be governed by a uniform federal rule. But Congress "has not provided a specific and definite answer in [the] [A]ct" to the question of whether that time limit ever can be equitably tolled. If Congress wanted to preclude tolling—which had achieved wide acceptance in the states centuries before the 1966 time limit was enacted—it would have said so clearly. Indeed, in the FTCA, Congress has been unusually "specific and definite" regarding other matters. *See* 28 U.S.C. § 2680(a)-(f), (h)-(n). But Congress said nothing expressly negating the avail-

ability of case-specific tolling of the time limit on presenting administrative claims.[7]

Contrary to the government's suggestion (at 35, 37, 39, 43, 46, 48), this analysis is unaffected by other timing rules established by Congress. For example, it is immaterial that Congress has expressly authorized additional time for a plaintiff to file an administrative claim where the United States substitutes itself for an employee sued in his individual capacity. 28 U.S.C. § 2679(d). That sheds no light on Congress's disposition toward the district courts' historic power to grant equitable tolling on a case-by-case basis upon a showing of extraordinary circumstances.

Because of the existing historic equitable power possessed by district courts, Congress had no need to enact statutory rules affirmatively authorizing case-by-case equitable tolling for FTCA claims. In contrast, when Congress desired the Court of Claims to

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[7] The government's litigating position concerning the relevance of state law to FTCA time-limit issues has not been consistent. Here, in the context of equitable tolling, the government argues for a uniform federal rule. Yet, in a different case—while the cert. petition in this case was pending—the government argued that the FTCA's express emulation of state law indicates Congress's intent for state law rules relating to time limits to apply directly. *See* Brief for the United States in Opposition at 7-8, *Augutis v. United States*, No. 13-1234, 2014 U.S. LEXIS 5776 (cert. denied Oct. 6, 2014) (contending that FTCA time limits do not preempt state statutes of repose). Under that theory, this case is even easier, as the Arizona law applicable here permits case-specific equitable tolling. *See, e.g., Hosogai*, 700 P.2d at 1331-32.

do anything remotely equitable regarding time limits, it had to affirmatively legislate. As discussed, the Court of Claims did not possess the historic equitable powers possessed by federal district courts. Thus, Congress saw it necessary to expressly provide for any tolling it wanted to permit in that court. *See* 28 U.S.C. § 2401(a) (adopting statutory categorical tolling rules for anyone who had not attained the age of majority, or tolling for anyone who had suffered under a disability). That Congress did not provide such statutory tolling rules for FTCA claims simply is a recognition that the district courts already possess such powers and that there was no need for Congress to grant further powers or to micromanage the equitable authority entrusted to district court judges.

Congress has long been aware of the presumption as applied to federal district courts. That it has not altered that authority or felt a need to codify that power is hardly grounds for finding that the presumption is overcome. That is the whole point of having a presumption. The presumption does not work if Congress has to affirmatively reinforce it.

Contrary to the government's argument (at 38), it is also not in the least bit probative that Congress in 1949 extended the suit-filing deadline from one year after accrual to two in order to ease the burden on claimants. This just shows that Congress felt that claimants *as a class* needed an extra year in which to sue, no-questions-asked. It does not show at all—much less *clearly*—that Congress felt that case-specific equitable tolling should not also be

available to deal with extraordinary circumstances arising case-by-case.

2. The FTCA's core purpose and legislative history favor equitable tolling.

Congress designed the FTCA in general and its administrative claims process in particular "to be 'unusually protective' of claimants." *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)). This strongly counsels against inferring an intent to deprive a district court of its power to toll the running of a limitation period where the defendant wrongfully conceals information critical to the plaintiff.

Congress designed the FTCA to create a compensation regime in which "equity [toward claimants] finds a comfortable home," *Holland*, 560 U.S. at 647. Fairness and justice toward victims of government negligence and wrongdoing were the driving forces that led to the passage of the FTCA. The legislature started with the proposition that persons injured by negligence should receive compensation. And it observed that, when that injury occurs because of the negligence of a private party, the law provides recompense. The FTCA was born "of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work" to that same extent. *Dalehite v. United States*, 346 U.S. 15, 24 (1953). Directing the government to assume that obligation was and is the Act's "broad and just purpose." *Indian Towing Co.*, 350 U.S. at 68.

Accordingly, in application, the FTCA is about doing right by victims and rewarding meritorious claims. As a bottom line, Congress expected that claimants would receive "just treatment." *Id.* at 69. Congress could have chosen to assign such claims to the Court of Claims, which lacks general equitable powers. Instead, it entrusted the federal district courts to apply the FTCA precisely because it viewed "[t]he United States courts a[s] well able and equipped to hear these claims and to decide them with justice and equity ... to ... the claimants." H.R. Rep. No. 79-1675, at 25 (1945). They are not to act "as ... self-constituted guardian[s] of the Treasury," *Indian Towing Co.*, 350 U.S. at 68, by "'add[ing] to [the Act's] rigor by refinement of construction,'" *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quoting *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926) (Cardozo, J.)).

That Congress designed the FTCA to protect claimants rather than promote rigid technicalities is also seen by examining what Congress did *not* want. It did not want a system that was "unjust to the claimants." H.R. Rep. No. 79-1287, at 2. And it did not want a regime that "appear[ed] to be ... unfair to those persons who have meritorious claims." *Id.* at 7.

The FTCA administrative claims process embodies this claimant-protective philosophy. And it does so by eschewing rigid rules and embracing informal claimant-friendly practices, similar to how a court of equity would. Indeed, a key motivation behind increasing the relative role of the administrative process was to "provid[e] for ... more fair and equitable

treatment of private individuals and claimants when they deal with the Government." H.R. Rep. No. 89-1532, at 5 (1966); *see Improvement of Procedures in Claims Settlement and Government Litigation: Hearing before Subcomm. No. 2 of the Comm. on the Judiciary*, 89th Cong. 14 (1966) ("1966 Hearings") (statement of Assistant Attorney General John W. Douglas) (explaining that the administrative claims process was and would continue to be governed by "informal agency procedures" that "should make it easier for many claimants to file claims and secure relief without the assistance of an attorney"); *id.* at 13 ("The claimant with a meritorious claim may not need to engage a lawyer.").

The informal claimant-friendly nature of the FTCA administrative claims process is evident from the start. Tort victims usually initiate the process by picking up and filling out a one-and-a-half-page form, called an "SF-95." Lester S. Jayson & Robert C. Longstreth, *Handling Federal Tort Claims* § 17.09[2] (2013). The claim does not have to be the equivalent of a fully drafted complaint. *Id.* Rather, the victim need only provide enough information to give the responsible agency enough notice to begin its own investigation. *Id.* Certain agencies estimate that the claimant can complete the form in only 30 minutes. *See* Transportation Security Administration Claims Management Branch Tort Claims Package 4, http://www.tsa.gov/sites/default/files/assets/pdf/sf95_cover_package_rev6_28.pdf (last visited Nov. 4, 2014).

The submission process, too, is unusually claimant-protective. Once the claimant completes the

form, the victim need not "file" or even "lodge" it with the responsible agency. He need only "present" it—a "textually weaker" requirement. *Perez v. United States*, 167 F.3d 913, 918 & n.2 (5th Cir. 1999). And if he "presents" it to the wrong agency, that agency will "transfer it forthwith to the appropriate agency ... and advise the claimant of the transfer." 28 C.F.R. § 14.2(b)(1). Rigidity is nowhere to be found.

So, too, regarding the agency action that then takes place. It does not remotely resemble what happens inside a courtroom. The agency does not "adjudicate" the victim's claim. It "consider[s]" the claim, with a view toward "compromise" or "settle[ment]." 28 U.S.C. § 2672. Indeed, the Justice Department's regulations counsel that "[w]henever feasible, administrative claims should be resolved through informal discussions, negotiations, and settlements rather than through the use of any formal or structured process." 28 C.F.R. § 14.6(a)(1). In the words of Assistant Attorney General Douglas, the goal is not legalistically precise resolution but rather "equitable settlement." 1966 Hearings at 24.

This claimant-friendly informality also characterizes the relationship between the administrative process and any subsequent court proceedings. If the claimant is dissatisfied with the resolution at the administrative level, she can sue in federal district court on a plenary basis. She is not bound by the positions she took in discussions with the agency. The court action is a new case. It is not an "appeal" of the agency resolution.

Thus, from soup to nuts, the administrative claims process bends over backwards to make sure that claimants get a fair shake. This strongly suggests that Congress had equity in mind when enacting the time limit for commencing that process.[8] And it strongly counsels against finding a clear congressional intent to deprive district courts of their power to toll a limitations period based on equity where a defendant engages in concealment or fraud.[9]

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[8] So, too, does Congress's decision to make the time limit begin to run upon a claim's "accru[al]." 28 U.S.C. § 2401(b). As this Court has observed, accrual requires a highly fact-intensive inquiry that can be murky and fraught with uncertainty. *See Kubrick*, 444 U.S. at 122 (noting that accrual depends upon a variety of facts, some of which may be "very difficult to obtain"). Use of accrual as the triggering event thus reveals Congress's awareness that district courts may, in appropriate cases, have delicate fact-related judgments to make in determining timeliness.

This is further reinforced by the relatively short default period (two years) that Congress gave victims in which to present claims. It is far from the "unusually generous" provisions, like the 12-year period of the Quiet Title Act, which the Court has found suggest an intent to preclude equitable tolling. *See United States v. Beggerly*, 524 U.S. 38, 49 (1998).

[9] Contrary to the government's suggestion (at 51-52), agencies themselves are well positioned to conduct an equitable tolling inquiry in the first instance. They would not be quantitatively overburdened. This is not a situation like in *United States v. Brockamp*, 519 U.S. 347 (1997), where a single agency processes over 200 million submissions a year. FTCA claims, spread out among all the responsible federal agencies, number around 30,000 per year.

Nor would agencies be qualitatively tasked with a new responsibility. In the context of determining "accru[al]," when

CONCLUSION

The judgment of the court of appeals should be affirmed.

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faced with a facially untimely claim, agencies *every day* have to choose among denying the claim as untimely, investigating and evaluating a request to find timeliness on the ground that accrual was sufficiently delayed, or considering both accrual and the merits. That is qualitatively highly similar to the inquiry that equitable tolling calls for, but of course it would be undertaken only in the rare instance in which *extraordinary circumstances* are present.

REPLY BRIEF

No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Congress's intent controls whether a particular statutory time limit is subject to equitable tolling. See, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008). Here, the text, context, and history of the time bar in the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), demonstrate that Congress enacted an absolute deadline that cannot be tolled.

When Congress drafted the FTCA in 1946, it modeled the time bar on the virtually identical provision governing Tucker Act suits. This Court had repeatedly held that provision to be a jurisdictional limit not amenable to tolling. Congress's decision to borrow the same text using the same sentence structure when it enacted the FTCA demonstrates that equitable tolling is precluded under the FTCA as well.

Respondent's arguments to the contrary lack merit. She denies the relevance of this Court's Tucker Act precedents because Tucker Act suits are brought in the Court of Claims, which, respondent asserts, historically lacked authority to apply equitable doctrines. But the premise of respondent's argument is simply wrong. This Court has repeatedly confirmed the Court of Claims' authority to consider equitable principles. And nothing in this Court's Tucker Act cases suggests that they interpreted the time bar to preclude equitable tolling based on *forum*-related considerations. That leaves respondent with no tenable basis to distinguish the FTCA's limitations provision.

Respondent's other arguments are similarly incompatible with the statutory text and this Court's precedent. She misreads *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), erroneously arguing that it forecloses any inquiry into whether Congress intended to preclude tolling in part due to sovereign-immunity considerations. She advances textual and structural arguments that do nothing to diminish the "good reason[s] to believe that Congress did *not* want the equitable tolling doctrine to apply." *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997). And she attempts to defend the lower court's equitable tolling holding through reliance on the distinct doctrine of fraudulent concealment, which affects only when a claim accrues and not when a limitations period can be suspended *following* accrual.

In the end, respondent cannot escape the fact that her argument utterly lacks historical support. She offers no evidence that *any* Member of Congress, court, or Executive Branch official believed that the FTCA's time bar could be tolled when it was enacted and re-

enacted in 1946 and 1966. Because Congress plainly intended to prohibit tolling then, the decision below should be reversed.

A. Congress Fashioned The FTCA Time Bar To Mirror The Jurisdictional Time Bar Applicable To Tucker Act Suits

Our opening brief explains (at 3-5, 18-26) that Congress modeled the FTCA time bar on the statutory time bar governing damages actions under the Tucker Act and its predecessors. The FTCA filled the gap left when Congress carved out tort claims from the Tucker Act's authorization of suits against the United States for money damages. See S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946) (1946 Senate Report) ("The existing exemption in respect to common-law torts appears incongruous."). Following the Tucker Act model, Congress "extend[ed] to claimants against the Government for torts of negligence the same right to a day in court which claimants now enjoy in fields such as breach of contract, patent infringement, or admiralty claims." S. Rep. No. 1196, 77th Cong., 2d Sess. 3 (1942).

Consistent with this purpose to create a tort-law analogue to the Tucker Act, Congress used virtually identical language in the FTCA's time bar. See U.S. Br. 20 n.6 ("Every claim against the United States cognizable * * * shall be forever barred[,] unless"). In the Tucker Act context, this Court had repeatedly interpreted that language to set forth a jurisdictional limit not subject to equitable tolling. U.S. Br. 19-22. In these circumstances—"[w]hen a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional"—this Court "will presume" that Congress intended to enact

a jurisdictional time limit that cannot be tolled. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011) (internal quotation marks and citation omitted). That rule controls here.

1. Respondent acknowledges (Br. 15) the direct textual parallel between the FTCA and Tucker Act time bars, but she insists the virtually identical language should be interpreted differently because, she contends, in contrast to district courts, the "Court of Claims did not traditionally exercise equitable power." Respondent asserts (Br. 51-52) that the differences between those tribunals trigger different presumptions: Congress must "affirmatively authoriz[e] tolling" for suits in the Court of Claims (now the Court of Federal Claims), but the opposite rule applies to suits in district courts. And she further asserts (Br. 39) that this forum-based distinction has "always done the heavy lifting in this Court's Tucker Act/Court of Claims cases." Respondent's theory fundamentally misunderstands this Court's precedent and the Court of Claims' power.

a. Respondent contends (Br. 27-29, 52) that the Court of Claims historically had no equitable authority. But that argument confuses equitable *doctrines* like tolling with the authority to order equitable *remedies*—*e.g.*, injunctions, declaratory judgments, and other prospective relief. The Court of Claims generally can award only money damages—just like district courts adjudicating FTCA suits. But respondent is wrong to suggest that the Court of Claims traditionally had no power to apply equitable doctrines en route to a money judgment.

Indeed, this Court's decision in *Bull* v. *United States*, 295 U.S. 247 (1935), squarely forecloses re-

spondent's contention. The question in *Bull* "was whether the Court of Claims, *in the interests of equity*," could offset taxes owed by taxes that had been overpaid but could not be recovered in a refund action because of the statute of limitations. *United States* v. *Dalm*, 494 U.S. 596, 606 (1990) (emphasis added). Although Congress had not explicitly authorized equitable recoupment, *Bull* held that the Court of Claims should have exercised that power because the government's retention of the money offended principles of "natural justice and equity." 295 U.S. at 261 (citation omitted). Because recoupment is an equitable defense that alleviates the consequences of a limitations bar, see *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 299-303 (1946), respondent is simply incorrect to assert that "when Congress desired the Court of Claims to do *anything remotely equitable* regarding time limits, it had to affirmatively legislate." Resp. Br. 51-52 (emphasis added).

Other decisions further demonstrate respondent's error. For example, in *United States* v. *Milliken Imprinting Co.*, 202 U.S. 168, 173-174 (1906), this Court held that the Court of Claims had the power to order equitable reformation of a contract. This Court has also approved the Court of Claims' authority to invoke the equitable doctrines of laches and estoppel against plaintiffs, thereby ensuring that "no one shall be permitted to found any claim upon his own inequity." *R.H. Stearns Co.* v. *United States*, 291 U.S. 54, 61-62 (1934) (equitable estoppel); *Nicholas* v. *United States*, 257 U.S. 71, 76-77 (1921) (laches); see *Henry* v. *United States*, 153 F. Supp. 285, 290 (Ct. Cl. 1957) (recognizing Supreme Court's approval of this power). And the Court of Federal Claims considers requests for equi-

table tolling of statutory time limits it deems amenable to that doctrine. See, *e.g.*, *Cloer* v. *Secretary of Health & Human Servs.*, 654 F.3d 1322, 1340-1342 (Fed. Cir. 2011) (en banc) (National Childhood Vaccine Injury Act), cert. denied, 132 S. Ct. 1908 (2012); *Arctic Slope Native Ass'n* v. *Sebelius*, 583 F.3d 785, 798-800 (Fed. Cir. 2009) (Contract Disputes Act), cert. denied, 561 U.S. 1026, and 131 S. Ct. 144 (2010).

Given these precedents, the central premise underlying respondent's effort to distinguish the Tucker Act cases—her assertion (Br. 29) that the Court of Claims has no power to "us[e] equity to prevent unfair results"—is mistaken.[1]

b. This Court has also previously rejected respondent's argument (Br. 13-14, 15, 38-39, 51-52, 54) that different presumptions regarding congressional intent apply depending on whether Congress vested jurisdiction in district courts or the Court of Claims. In *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), an employee argued that Congress intended to permit jury trials in Age Discrimination in Employment Act (ADEA) suits against the federal government because "Congress conferred jurisdiction over ADEA suits upon the federal district courts, where jury trials are ordinarily available, rather than upon the Court of Claims, where they are not." *Id.* at 164. The Court

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[1] Respondent states that Congress empowered district courts — and not the Court of Claims—to adjudicate FTCA cases "precisely because" "'the United States courts'" are equipped to provide "'justice and equity'" to claimants. Resp. Br. 54 (quoting H.R. Rep. No. 1675, 79th Cong., 2d Sess. 25 (1946)). That mischaracterizes the legislative history. In fact, the House Report's reference to "United States courts" unambiguously encompassed both district courts *and* the Court of Claims. Moreover, the report discussed private claims generally, not the FTCA specifically.

dismissed this argument, finding "little logical support for th[e] inference." *Ibid.* The Court emphasized that "if Congress waives the Government's immunity * * * , the plaintiff has a right to a trial by jury only where that right is one of the terms of [the Government's] consent to be sued." *Id.* at 160 (internal quotation marks and citation omitted; brackets in original). Thus, irrespective of the forum, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.* at 161 (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)). The same analysis defeats respondent's forum-based rationale here.

c. Respondent's attempt (Br. 28) to distinguish the Tucker Act cases on forum-related grounds is also at odds with the reasoning of those decisions.[2] As explained in our opening brief (at 20-22, 27-28, 30-32, 40), those cases rested primarily on the statutory language and the settled rule that time limits conditioning a waiver of sovereign immunity must be strictly construed. See, *e.g.*, *Soriano*, 352 U.S. at 273; *Finn* v. *United States*, 123 U.S. 227, 231 (1887); *Kendall* v. *United States*, 107 U.S. 123, 125 (1883). Nothing in the decisions implies the result would have been different if the time bar had governed cases brought in district court.

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[2] Respondent further asserts that those cases hinged on the Tucker Act's failure to state that "the government can be sued to the same extent as a private person." Resp. Br. 38-39 (citation omitted). But nothing in the cases suggests that the *absence* of such a provision had any relevance to the Court's holding that the time bar could not be tolled.

Just the opposite: *Soriano* made clear that the same jurisdictional analysis would govern claims brought under "statutes permitting suits for tax refunds, tort actions, [and] alien property litigation," 352 U.S. at 275—all of which can be adjudicated in district court, see 28 U.S.C. 1346(b)(1); 28 U.S.C. 1340 (1952); 50 U.S.C. App. 9(a) (1952). Moreover, the Court has often relied on Tucker Act precedents when interpreting statutes conferring jurisdiction on district courts—including the FTCA. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Richards* v. *United States*, 369 U.S. 1, 7 n.12 (1962); see also *Lehman*, 453 U.S. at 161 (ADEA). It is accordingly untenable for respondent to contend (Br. 38) that the *Kendall-Soriano* line of cases has "[no]thing to do with statutes other than the Tucker Act and tribunals other than the Court of Claims."

2. Respondent fares no better with her assertion (Br. 39) that the Tucker Act cases do not illuminate the meaning of the virtually identical FTCA time bar because they do not "contain anything approaching a linguistic analysis" of the limitations provision. *Kendall*—the Court's first decision on the issue—emphasized the language declaring that untimely claims "shall be forever barred" and reasoned that "[t]he express words of the statute leave no room for contention" that any claim could proceed outside the specified period. 107 U.S. at 124, 125. "[I]n view of the language of the statute," the Court held that equitable tolling was unavailable. *Id.* at 126. See also *Finn*, 123 U.S. at 229, 232 (similar).

In any event, there is no doubt that this Court's Tucker Act decisions attached jurisdictional significance to the time bar and held that its text did not

permit equitable tolling. The Court's decisions thereby provided Congress with a clear model of how to draft a jurisdictional time bar that could not be tolled. Because Congress employed the very same operative language using the very same sentence structure when it drafted the FTCA time bar governing the tort claims that were carved out of the Tucker Act, Congress must be presumed to have intended that language to be interpreted the same way.[3] It makes no sense to think that Congress borrowed the identical language and structure in this deliberately parallel context to achieve the *opposite* result and *allow* equitable tolling.[4]

3. Respondent asserts (Br. 41-42) that *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), "rejected th[e] exact argument" that Congress intended the FTCA to serve as the tort-law analogue to the Tucker Act. That is incorrect.

Yellow Cab held that the United States may be joined as a third-party defendant under the FTCA.

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[3] Respondent accordingly cannot dismiss (Br. 39) the analysis in *John R. Sand & Gravel* simply because it invoked *stare decisis*. *Stare decisis* enables Congress to legislate against a stable legal backdrop, and the doctrine "has added force when the legislature * * * ha[s] acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Congress justifiably relied on the settled meaning of the Tucker Act time bar when it incorporated the same language into the FTCA.

[4] Respondent observes that other time bars use "forever barred" yet can be tolled. Resp. Br. 41 (citing 15 U.S.C. 15b). But those statutes, unlike the FTCA, are entirely unrelated to the Tucker Act; do not borrow its unique sentence structure providing that "[e]very claim against the United States, cognizable * * * , shall be forever barred unless"; and do not involve waivers of sovereign immunity.

340 U.S. at 556-557. In reaching that conclusion, the Court rejected the notion that joinder should be prohibited under the FTCA because it is not permitted under the Tucker Act. *Id.* at 550 n.8. The Court observed that Congress created several differences between a district court's adjudication of FTCA and Tucker Act suits with respect not only to joinder but also to whether the court is "restricted to claims not exceeding $10,000," has concurrent jurisdiction with the Court of Claims, and must apply the Federal Rules of Civil Procedure. *Ibid.*

Notably, in highlighting differences between the FTCA and the Tucker Act, *Yellow Cab* focused on *textual* distinctions. 340 U.S. at 549, 550 n.8, 553. It was accordingly clear that Congress wanted to treat FTCA and Tucker Act cases differently in those respects. By contrast, the statutory time bars governing FTCA and Tucker Act suits are virtually identical, and there is no textual or historical basis for concluding that Congress intended them to be interpreted in fundamentally different ways.[5]

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[5] Respondent observes (Br. 41-42) that *Yellow Cab* declined to rely on statements in House Reports addressing draft tort-claim bills proposed in 1942 and 1945 because those statements were omitted from the Senate Report accompanying the final version of the FTCA enacted in 1946. But this Court has subsequently relied on those House Reports even when their content was not carried over to the 1946 Senate Report. See, *e.g.*, *Berkovitz* v. *United States*, 486 U.S. 531, 538 n.4 (1988); *Dalehite* v. *United States*, 346 U.S. 15, 28-29 & n.21 (1953). Respondent, too, relies on those reports. Resp. Br. 54 (quoting language of 1945 House Report that does not appear in 1946 Senate Report). In any event, the 1946 Senate Report itself emphasizes that the FTCA would serve as the tort-law analogue to the Tucker Act. See 1946 Senate Report 31

B. Sovereign-Immunity Considerations Confirm That The FTCA Time Bar Precludes Equitable Tolling

Our opening brief explains (at 26-32, 39-42) that Congress intended to preclude tolling of the FTCA time bar in part because it conditioned Congress's waiver of sovereign immunity. Respondent contends (Br. 24-30) that *Irwin* forecloses that argument. She is mistaken.

1. *Irwin* articulated a rebuttable presumption that statutory time limits for filing suit against the federal government are subject to equitable tolling. See U.S. Br. 18-20.[6] The Court adopted that presumption out of deference to what it concluded was Congress's "likely meaning in the mine run of instances." *John R. Sand & Gravel*, 552 U.S. at 137. Accordingly, the Court has repeatedly observed that the presumption "is not conclusive" and can be rebutted "by demonstrating Congress' intent to the contrary." *Id.* at 137-138; see *Brockamp*, 519 U.S. at 350 (presumption rebutted when there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply").[7]

(deeming Tucker Act's exception for claims "sounding in tort" "incongruous").

[6] As explained in our opening brief (at 52-53), it is not clear that the *Irwin* presumption applies to the adjudication of claims presented to a federal agency. See *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827. But if it does, it is rebutted here.

[7] The government agrees with respondent that the *Irwin* presumption applies at the threshold to pre-*Irwin* statutes. Nevertheless, courts may consider whether Congress legislated before or after *Irwin* when determining whether the presumption reflects a "realistic assessment of legislative intent," 498 U.S. at 95, in any particular case. See *Holland* v. *Florida*, 560 U.S. 631, 646 (2010) (presumption is stronger as applied to post-*Irwin* statutes because

2. Respondent does not dispute that *Irwin*'s presumption is rebuttable, but she seeks (Br. 25) to circumscribe the inquiry into Congress's intent with a bright-line rule that "sovereign immunity concerns are *not* a basis for rejecting the presumption."

Respondent is wrong. *Irwin* holds that sovereign-immunity considerations—*without more*—do not establish that Congress intended to foreclose tolling. 498 U.S. at 95-96. But that does not mean that sovereign-immunity considerations are *irrelevant*. Respondent's restrictive rule would violate *Irwin*'s own rationale: Whereas *Irwin* based the presumption on a "realistic assessment of legislative intent," *id.* at 95, respondent would disregard what Congress *actually* intended if the historical evidence showed that sovereign-immunity concerns shaped Congress's intent concerning a particular time bar. Cf. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring in the judgment) (cautioning against "apply-[ing] a new background rule to previously enacted legislation" if it would amount to "revers[ing] prior congressional judgments").

As this Court confirmed in *John R. Sand & Gravel*, even after *Irwin* it is proper to consider whether Congress intended to enact a jurisdictional time bar to "achieve a broader system-related goal, such as * * * limiting the scope of a governmental waiver

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"Congress * * * was likely aware that courts, when interpreting [the statute's] timing provisions, would apply the presumption"); *Cannon* v. *University of Chi.*, 441 U.S. 677, 698-699 & nn.22-23 (1979) (even if intervening Supreme Court precedent suggests a different interpretive approach, "evaluation of congressional action" still "must take into account its contemporary legal context").

of sovereign immunity." 552 U.S. at 133-134 (citing *Dalm*, 494 U.S. at 609-610). *Irwin* accordingly provides no basis to ignore that Congress in 1946 and 1966 intended to preclude tolling under the FTCA in part due to sovereign-immunity considerations.[8]

C. Respondent's Arguments That The FTCA Nevertheless Permits Equitable Tolling Lack Merit

Respondent cannot counter the compelling grounds for concluding that the FTCA time bar is jurisdictional and does not permit tolling.

1. Respondent contends (Br. 32-34) that the FTCA time bar is not jurisdictional because it appears in a different provision and chapter of the United States Code than Section 1346(b)(1), which confers jurisdiction on district courts to adjudicate FTCA claims.

Respondent's argument fails because this Court has already made clear that Section 1346(b)(1) is not the *only* source of jurisdictional limits on FTCA suits. In *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court strictly construed 28 U.S.C. 2675(a)'s administrative-exhaustion requirement and affirmed the dismissal of an FTCA action—for lack of jurisdiction—where the claimant had not satisfied that requirement. 508 U.S. at 109-113; see *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)

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[8] Although respondent invokes the "hornbook" principle that time bars ordinarily can be tolled (Br. 4), in fact "hornbook law" at the time recognized the important qualification that "'[g]enerally speaking the time requirement prescribed by a statute granting the right to sue the United States'" is "'jurisdictional'" and an "'indispensable condition of the liability and of the action which it permits.'" *Simon* v. *United States*, 244 F.2d 703, 705 (5th Cir. 1957) (emphasis omitted) (quoting 34 Am. Jur. *Limitation of Actions* § 7, at 17 (1941 & 1956 Supp.)).

("[S]ome time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants.").[9]

Respondent's structural argument fares no better. Respondent maintains that Congress purposefully placed the time bar in a different chapter in the 1948 recodification of Title 28 to differentiate it from the FTCA's jurisdictional provisions. But Congress expressly *denied* that this was the recodification's purpose: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 * * * in which any * * * section is placed." Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. That congressional directive settles the matter.

Moreover, this Court has repeatedly found time bars jurisdictional even though they did not appear in the same chapter or statutory provision defining the "jurisdiction" of the court administering the bar. See, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007); *Dalm*, 494 U.S. at 601-602, 609-610. Once again, the Tucker Act foundation for Section 2401(b) confirms that conclusion: The petitioner in *John R. Sand & Gravel* argued that 28 U.S.C. 2501 is not jurisdictional because in the same 1948 recodification it was placed "in a procedure chapter of the Judicial Code" "separate and distinct * * * from the jurisdictional provi-

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[9] Respondent's reliance (Br. 32-33) on *FDIC* v. *Meyer*, 510 U.S. 471 (1994), is misplaced. *Meyer* interpreted a statutory provision that referred to claims "cognizable *under section 1346(b)*," but the Court expressly distinguished this inquiry from "whether a claim is cognizable *under the FTCA* generally." *Id.* at 476-477 & n.5. Thus, *Meyer* discussed which elements *of Section 1346(b)* are jurisdictional, but had no occasion to go further and "explain[] exactly what about the FTCA is jurisdictional." Resp. Br. 32.

sions." Pet. Br. at 10, 19-24, *John R. Sand & Gravel*, *supra* (No. 06-1164). As it did before, the Court should reject that argument.

2. Respondent also cannot square her argument with Congress's enactment of numerous private laws granting district courts "jurisdiction" to hear untimely FTCA claims. Respondent maintains that "no inference can be drawn" from those bills (Br. 43), but Congress would not have needed to "confer[]" "jurisdiction" "*notwithstanding*" the time bar if it did not consider that bar to be a jurisdictional impediment. U.S. Br. 44-46.

Respondent observes (Br. 43) that other private laws authorized untimely FTCA claims without using the word "jurisdiction." But that does not mean Congress was "inconsistent[]" (*ibid.*) in viewing the time bar as jurisdictional. Indeed, the legislative history of those laws expressly states that their purpose was to "confer *jurisdiction* on a district court and waive lapse of time." H.R. Rep. No. 434, 94th Cong., 1st Sess. 1 (1975) (emphasis added); see, *e.g.*, H.R. Rep. No. 2450, 84th Cong., 2d Sess. 1 (1956); S. Rep. No. 837, 84th Cong., 1st Sess. 3 (1955).

Respondent further asserts (Br. 43) that Congress's decision "to revive a claim that a *court* deemed time-barred" does not show that Congress agreed the bar was jurisdictional. But several of the private laws involved claims that had never been presented to a court, where the jurisdictional conclusion was Congress's alone. See, *e.g.*, H.R. Rep. No. 58, 91st Cong., 1st Sess. 2-3 (1969); H.R. Rep. No. 120, 85th Cong., 1st Sess. 3 (1957). Moreover, if Congress had disagreed with courts on this issue it would have clarified that equitable tolling was available when it reenacted the

time bar in 1966. Instead, Congress adhered to the rule recognized in those decisions by reenacting the bar without material change and rejecting proposals to embrace equitable tolling in subsequent decades. See U.S. Br. 39-44, 47.

3. Even if this Court were to conclude that the FTCA's time bar is not jurisdictional, respondent cannot refute the powerful evidence that Congress nonetheless intended to preclude equitable tolling. Respondent's sole textual argument to the contrary relies on 28 U.S.C. 1346(b)(1) and 2674, which provide that the United States is liable under the FTCA to the same extent as a private person under state tort law. Resp. Br. 37-38, 44-51 & n.6.[10] But as respondent elsewhere seems to recognize (Br. 50), a key purpose of the FTCA limitations provision is to ensure that the deadline for filing an FTCA action will *not* mirror private-party, state-law tort suits. As this Court has observed, "Congress has been specific in those instances where it intended the federal courts [applying the FTCA] to depart completely from state law." *Richards*, 369 U.S. at 14. Indeed, *Richards* identified the FTCA time bar as a prime example of a provision in which Congress "specifically" indicated that "the liability of the United States is *not* co-extensive with that of a private person under state law." *Id.* at 13-14 & n.28 (emphasis added). Because Section 2401(b) imposes uniform time limits that apply to all FTCA claims without regard to how private defendants are treated in analogous circumstances, Sections

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[10] Respondent emphasizes (Br. 38-39) that the Tucker Act does not contain similar language, but that is because Congress did not need to borrow state-law substantive standards of liability for the federal claims under the Tucker Act.

1346(b)(1) and 2674 provide no support for equitable tolling.

4. Moreover, respondent has no persuasive answer to our point (U.S. Br. 35-36, 43-44) that when Congress wanted to permit equitable tolling in closely analogous contexts, it did so expressly. In an effort to explain why Congress affirmatively authorized tolling in specified circumstances in Tucker Act suits (see 28 U.S.C. 2501) but not FTCA actions, respondent clings (Br. 51-52) to her flawed distinction between the Court of Claims and district courts. But even if this Court had not already rejected that theory, see *Lehman*, 453 U.S. at 164, it would not explain why Congress expressly permitted tolling in suits brought *by* the government under 28 U.S.C. 2416, which Congress enacted *the very same day* in 1966 as it reenacted the FTCA time bar without any equitable exception. U.S. Br. 43-44. See also H.R. Rep. No. 308, 80th Cong., 1st Sess. A185 (1947) (observing that 1948 recodification "omitted as superfluous" an express prohibition on tolling beyond specified disabilities in 28 U.S.C. 2401(a)).

5. Respondent also fails to overcome the significance of Congress's decision to extend the FTCA's suit-filing deadline in 1949. She maintains (Br. 52) that Congress simply "felt that claimants *as a class*" needed additional time. But the relevant House and Senate Committees observed that the existing one-year period was unfair in individual cases of hardship. U.S. Br. 38-39. That concern makes sense only if Congress understood the original time bar to preclude equitable tolling on a case-by-case basis.

6. Finally, respondent points to (Br. 53) the FTCA's purpose of providing a remedy to victims of

government negligence. But "no legislation pursues its purposes at all costs" and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam). Indeed, the "very purpose" of the FTCA's time bar is to "make it impossible to enforce what were otherwise perfectly valid claims" if they are filed beyond the period Congress specified. *Kubrick*, 444 U.S. at 125. This Court must "give * * * effect" to that time bar "in accordance with * * * legislative intent." *Ibid.* Because Congress did not intend to permit tolling under the FTCA, respondent cannot excuse her untimely filing.

D. The Fraudulent Concealment Doctrine Does Not Support Respondent's Equitable Tolling Argument

Respondent argues (Br. 4-5, 12, 18-20, 45-49 & n.6) that Congress intended the FTCA time bar to incorporate the fraudulent concealment doctrine. That doctrine delays accrual of a claim when a defendant prevents a diligent plaintiff from discovering her cause of action by concealing the relevant facts. See *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414, 1419-1420 (2012); Note, *Fraudulent Concealment of a Right of Action and the Statute of Limitations*, 43 Harv. L. Rev. 471, 473-476 (1930). We agree that fraudulent concealment can affect the *accrual* of an FTCA claim, but that does not justify the distinct and much broader *equitable tolling* rule applied here. Moreover, respondent cannot in any event benefit from delayed accrual based on fraudulent concealment.

1. This Court has long observed that the statute of limitations in cases involving fraudulent concealment

"does not begin to run until the fraud is discovered." *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 350 (1875); see *Exploration Co.* v. *United States*, 247 U.S. 435, 447 (1918) (reaffirming *Bailey*'s rule that in cases involving fraudulent concealment "the cause of action d[oes] not accrue until the discovery of the fraud"). The discovery rule for fraudulent concealment is an "exception to the general limitations rule that a cause of action accrues once a plaintiff has a complete and present cause of action." *Merck & Co.* v. *Reynolds*, 559 U.S. 633, 644 (2010) (internal quotation marks and citation omitted). The core justification for the rule is that defendants are not *entitled* to repose when their own deceptive conduct has foreclosed potential plaintiffs from seeking redress. By delaying accrual of a claim, the doctrine ensures that "the law which was designed to prevent fraud [does not] become the means by which it is made successful and secure." *Ibid.* (quoting *Bailey*, 88 U.S. (21 Wall.) at 349).

The fraudulent concealment discovery rule provides no support for interpreting the FTCA to permit equitable tolling. Unlike fraudulent concealment, equitable tolling does not require that a defendant's misconduct prevented a plaintiff from discovering her claim; it focuses instead on the *plaintiff* and whether there is an equitable reason for excusing her compliance with a statutory deadline, see *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). And while fraudulent concealment only affects when a claim accrues, "equitable tolling pauses the running of" a limitations period *after* accrual. *Ibid.*[11]

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[11] Although delayed accrual and equitable tolling may produce the same result in certain situations, they are analytically distinct. See *Holland*, 560 U.S. at 647 ("We must * * * distinguish be-

There is a reasonable basis for presuming that Congress intended the FTCA to incorporate the fraudulent concealment discovery rule. That rule is "read into every" limitations statute, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946), and it is regularly applied in Tucker Act suits even though that time bar is jurisdictional and not subject to equitable tolling. See, *e.g.*, *Thompson* v. *United States*, 88 Fed. Cl. 263, 266 (Fed. Cl. 2009), aff'd, 480 Fed. Appx. 575 (Fed. Cir. 2012) (per curiam); *Young* v. *United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008), cert. denied, 555 U.S. 1214 (2009). Indeed, the FTCA (like the Tucker Act) expressly provides that the time limit for presenting an administrative claim does not begin to run until "such claim accrues." 28 U.S.C. 2401(b). But there is no comparable reason to think that Congress intended to permit equitable tolling; as we have established, the FTCA's text, context, and history instead demonstrate the opposite.

Thus, although fraudulent concealment affects the *accrual* of an FTCA claim, see, *e.g.*, *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 250 (1st Cir. 1990); *Diminnie* v. *United States*, 728 F.2d 301, 305 (6th Cir.), cert. denied, 469 U.S. 842 (1984), respondent errs in invoking the doctrine to support the court of appeals' equitable tolling analysis.[12]

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tween the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations" (citation omitted)); *United States* v. *Beggerly*, 524 U.S. 38, 49-50 (1998) (Stevens, J., concurring) (fraudulent concealment doctrine is "distinct from equitable tolling" and "might apply" to the Quiet Title Act, 29 U.S.C. 2409a, which cannot be tolled).

[12] This Court has sometimes used equitable tolling terminology when discussing the fraudulent concealment doctrine, even when it was clearly referring to the discovery accrual rule. See, *e.g.*, *TRW*

2. Respondent cannot claim delayed accrual based on fraudulent concealment because, as the district court concluded, none of the facts "were unknown to [her] or concealed by the United States." Pet. App. 6a.

Respondent claims the Federal Highway Administration (FHWA) negligently approved Arizona's allegedly defective cable median barrier for use on the National Highway System (NHS). J.A. 149-151. It was apparent the barrier might be defective when the accident occurred on February 19, 2005—and indeed, respondent sued Arizona less than one year later, alleging that the barrier was "not designed, constructed or maintained in conformance with generally accepted standards." J.A. 26, 29. Respondent also was aware that FHWA had approved the barrier. J.A. 145-146 (citing September 12, 2005 FHWA memorandum indicating barrier was "approved for use").[13] Thus, respondent knew every fact necessary to her FTCA suit more than *five years* before she filed an administrative claim.

Inc., 534 U.S. at 27 (summarizing applications of discovery rule, including principle that "equity tolls the statute of limitations in cases of fraud or concealment"); see also *Simmonds*, 132 S. Ct. at 1419-1420; *Irwin*, 498 U.S. at 96. In those cases, unlike this one, it made no legal difference whether fraudulent concealment was labeled a doctrine of tolling or accrual.

[13] Respondent incorrectly asserts (Br. 10) that FHWA made false representations in that 2005 memorandum. All the memorandum said was that FHWA "considered [the barrier] acceptable" for use on the NHS—and that was true. See FHWA, *Information: Generic Cable Barriers* (Sept. 12, 2005), http://www.safety.fhwa.dot.gov/roadway_dept/policy_guide/road_hardware/barriers/pdf/b64sup.htm. That is the very basis of respondent's FTCA claim: she alleges FHWA was negligent in granting the approval.

Respondent nevertheless asserts (Br. 10-11) that the time bar did not begin to run until April 2009, when her counsel supposedly "learned for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing." But the record disproves that counsel only learned about this in 2009. In November 2006, respondent's counsel—who was representing plaintiffs in several cases involving the same barrier—submitted a FOIA request to FHWA with allegations that the agency had "approved [the barrier] for use on the NHS" and "deemed [it] * * * compliant" with crashworthiness standards, even though it was counsel's "understanding" that the barrier had "never passed [the allegedly required] testing." J.A. 35, 36, 41. In December 2007, respondent's counsel submitted an administrative FTCA claim on behalf of a different individual alleging that FHWA had negligently approved the barrier because it had not been crash tested. J.A. 106.[14] And in May 2008, respondent's counsel filed an FTCA suit on behalf of a different plaintiff alleging that FHWA was negligent in "approv[ing]" Arizona's cable median barrier because it was an "untested design." Compl. at 4, *Melvin* v. *United States*, 2:08-cv-00950-DKD (D. Ariz. May 20, 2008); see also J.A. 134-136.

Respondent does not—and cannot—explain how "the government prevent[ed] her from presenting a timely administrative claim" when her counsel was pursuing an FTCA suit based on materially identical

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[14] Notably, counsel acknowledged that the "deadline for presenting th[is] claim" was two years from the accident, J.A. 98, apparently recognizing there was no fraudulent concealment.

facts more than two years before she submitted a claim to FHWA. Br. 8 (capitalization omitted).

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2014

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 13-1074, 13-1075

Supreme Court, U.S.
FILED
NOV 12 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

KWAI FUN WONG, CONSERVATOR

Respondent.

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of amicus curiae briefs have been filed with this Court.

The American Association for Justice is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Many American Association for Justice members represent people who have been wrongfully injured, including those who have been injured by negligent employees of the Federal Government and who must seek compensation under the Federal Tort Claims Act.

American Association for Justice members are keenly aware of the importance of keeping the doors of our courthouses open for those who seek legal redress. Courts, including federal courts, have done so, using their inherent equitable powers. Federal courts of appeals have overwhelmingly held that courts may equitably toll the FTCA's time limitations in appropriate cases. The American Association for Justice is concerned that if the Government's position is adopted in this case—prohibiting federal courts from tolling those time limits in cases where the plaintiff has diligently pursued her cause of action but has failed to meet those deadlines for reasons beyond her control—those courthouse doors will be shut against claimants whom Congress intended to have their day in court. To protect the rights of those

persons, the American Association for Justice submits this amicus curiae brief.[1]

SUMMARY OF ARGUMENT

1. The question presented in this case, whether the time limitations imposed on plaintiffs by the Federal Tort Claims Act ("FTCA") may be equitably tolled, has been answered in the affirmative by all federal circuit courts of appeals to have addressed the question. The Government has provided this Court with no reason to reject that considered construction.

No one disputes that waiver of sovereign immunity and the scope of that waiver is a matter of congressional intent. But that intent cannot be reliably ascertained by examining this Court's decisions concerning other statutes reaching back to the 19th Century, or by looking to inconclusive legislative history or the bills Congress did not pass. The intent of Congress is clear from the text of the statute itself.

This Court set forth a bright-line rule for determining whether time limitations on Congress-created causes of action preclude courts from making use of equitable tolling: It is presumed that Congress intended to permit courts to equitably toll statutes of limitations unless Congress has issued a clear statement to the contrary. The Government's

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

attempts to label the FTCA's time limitations as "jurisdictional" does not rebut this presumption. Indeed, this Court in recent cases has distinguished between those statutory requirements that are truly jurisdictional, in the sense of depriving the federal court of its adjudicatory power, and those that are mere "claims processing rules," which may be tolled. Generally, this Court has found that time limitations on the filing of claims against the Federal Government belong in the second category. The plain text of the FTCA indicates that its time limits are claims-processing rules as well.

Perhaps the most important textual indicator of congressional intent is the fact that Congress waived sovereign immunity and vested federal courts with the jurisdiction to hold the United States liable in the same manner and to the same extent as a private individual. Statutes of limitations in causes of action against private individuals are usually subject to equitable tolling. Congress intended the limitations on the national government's liability to be subject to the same equitable considerations.

Nor does the statutory phrase "shall be forever barred" rebut the presumption in favor of equitable tolling. That language, though emphatic, is not itself jurisdictional. Its plain meaning is that causes of action that have expired due to the time limits shall not be resuscitated. Equitable tolling, on the other hand, suspends the time limitation and prevents the cause of action from expiring. This Court has held that the same phrase used in the Tucker Act is jurisdictional and not amenable to equitable tolling. But that decision was based on the principle of *stare decisis*, not on the plain meaning of the statutory text. Moreover, there are other statutes that also employ

the "shall be forever barred" phraseology which this Court has held are subject to equitable tolling.

2. The interpretation of the FTCA time limits adopted by the lower court and the overwhelming majority of other federal courts of appeals is also consistent with the compensatory purpose of the FTCA. Congress enacted the statute, after decades of consideration, following a tragic aircraft accident that left families without legal recourse.

In addition, prohibiting courts from using their equitable tolling authority would allow the Government to take advantage of injured victims, including children, who are vulnerable to unexpected traps in FTCA law. One example is a provision under which private physicians employed at private medical facilities that receive federal funds may be deemed to be Federal Government employees. Courts have tolled the FTCA deadlines to prevent unfairness in such instances. It is consistent with Congress's compensatory purpose that courts exercise their equitable powers to avoid harsh results.

3. Federal courts' judicious use of equitable tolling of statutes of limitations also prevents deprivations of plaintiffs' constitutional rights to due process and access to the courts. In one case before this Court, the plaintiff was deprived of her cause of action, not because she lacked diligence, but because of shortcomings by the district court and magistrate system in processing her motions. This Court has previously held in similar circumstances that such a deprivation violated a plaintiff's right to due process.

In the other case before this Court, the plaintiff was prevented from timely filing her FTCA claim by the actions of a federal agency that concealed the Federal Government's role in causing a highway fatality. This Court has previously held that such concealment may amount to violation of plaintiff's constitutional right of access to the courts. In such cases, federal courts should be authorized to make use of their equitable power to toll the statutory time limits and thereby avoid deprivations of claimants' fundamental constitutional rights.

ARGUMENT

INTRODUCTION

President Abraham Lincoln famously declared, it is "as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals." *United States v. Mitchell*, 463 U.S. 206, 213 (1983) (quoting Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862)). It would be 84 years before Congress would shoulder that responsibility to render justice to those who have been injured because of the negligence of Federal Government employees by enacting the Federal Tort Claims Act.

The FTCA offers fair compensation for those who might be injured due to the negligence of government employees, including "tens of millions of Americans [who] receive medical care at military base facilities, U.S. Department of Veterans Affairs (VA) hospitals, and federally funded clinics," as well as the millions of Americans who "share the road every day with postal trucks and military vehicles." Laurie Higginbotham & Jamal Alsaffar, *Navigating The*

Federal Tort Claims Act, 47 Trial 14, 14 (2011). But the FTCA "also presents the challenge of satisfying myriad federal and state law requirements that threaten to destroy [a plaintiff's] chances of recovery." *Id.* One such challenge is compliance with the Act's time limits on presenting claims to the appropriate federal agency and on filing in federal court.

The doctrine of sovereign immunity is firmly rooted in American jurisprudence. *See Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.") Because any compensation for harm caused by government employees must necessarily be drawn from the Treasury, the authority to waive immunity is constitutionally placed in the hands of Congress. *See* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1264 (2009). As this Court has made clear, "[i]f any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress." *United States v. Dalm*, 494 U.S. 596, 610 (1990).

The Federal Government was never wholly unaccountable for wrongs to its citizens. The First Amendment guaranteed to Americans the right to petition their Government for redress directly through private bills in Congress. *Mitchell*, 463 U.S. at 212-213 (1983). In 1855 Congress established the Court of Claims and over the course of time enacted "a broad tapestry of authorized judicial actions against the federal Government." Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245,

1252-53 (2014). Among them is the Federal Tort Claims Act, which states:

> The United States shall be liable [for tort claims] *in the same manner and to the same extent as a private individual* under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674 (emphasis added). Congress provided that the federal courts

> [S]hall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances *where the United States, if a private person, would be liable* to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (emphasis added). In a separate section, Congress also provided:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered

> mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b).

The question presented in this case—whether the time limitations prescribed in 28 U.S.C. § 2401(b) are subject to equitable tolling—is not an unsettled one. Nine United States courts of appeals have held or assumed that those limits may be equitably tolled. *See Sanchez v. United States*, 740 F.3d 47, 54 (1st Cir. 2014); *Santos ex rel. Beato v. United States*, 559 F.3d 189, 194 (3d Cir. 2009); *Kokotis v. U.S. Postal Serv.*, 223 F.3d 275, 280-81 (4th Cir. 2000); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999); *Glarner* v. *United States*, 30 F.3d 697, 700-01 (6th Cir. 1994); *Arteaga v. United States*, 711 F.3d 828, 832-33 (7th Cir. 2013); *T.L. v. United States*, 443 F.3d 956, 961 (8th Cir. 2006); *Wong v. Beebe*, 732 F.3d 1030, 1046 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014); *Benge* v. *United States*, 17 F.3d 1286, 1288 (10th Cir. 1994). No circuit holds that federal courts lack jurisdiction to toll the FTCA time limitations where equity may require. The American Association for Justice respectfully submits that the Government has advanced no persuasive rationale for overturning that body of federal precedent.

I. THE TEXT OF THE FEDERAL TORT CLAIMS ACT SUPPORTS APPLICATION OF EQUITABLE TOLLING OF THE TIME LIMITS IN 28 U.S.C. § 2401(b).

The Government's position may be put succinctly: The statutory time limits are jurisdictional by congressional design, they are to be strictly

interpreted, and they do not permit equitable tolling. *See* Pet'r's Br.17, *United States v. Wong*, No. 13-1074 (U.S. Sept. 9, 2014). The Government correctly states whether federal courts may toll the Act's time limits for equitable reasons turns on the intent of Congress. *Id.* at 18. However, the Government devotes a large part of its argument to an attempt to establish congressional intent through examination of Congress's use of similar language in statutes enacted in 1863 and 1911, *see id.* at 20-28. The Government also looks for clues to congressional intent in other pre-FTCA statutes, *see id.* at 31-35; in the FTCA's inconclusive legislative history, *see id.* at 36-39; in the subsequent actions of Congress, *see id.* at 40-49; and in bills that Congress did not enact. *See id.* at 49-50.

Of course, as this Court has "repeatedly held, the authoritative statement [of Congress's intent] is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). The American Association for Justice submits that the statutory text in this case gives no indication, much less a "clear statement," that Congress intended to prohibit federal courts from equitably tolling the FTCA time limitations in appropriate cases.

A. The Limitations Periods in 28 U.S.C. § 2401(b) Are Presumed to be Subject to Equitable Tolling in the Absence of a Clear Statement by Congress to the Contrary.

The task of ascertaining whether Congress intended to preclude federal courts from tolling the time limitations in 28 U.S.C. § 2401(b) begins with

this Court's decision in *Irwin v. Veterans Administration*, 498 U.S. 89 (1990).

Irwin's employment discrimination suit under Title VII of the Civil Rights Act of 1964 was dismissed for non-compliance with 42 U.S.C. § 2000e-16(c), which allows an individual a limited time to commence suit after receiving a right-to-sue letter from the Equal Employment Opportunity Commission. This Court granted certiorari "to resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred." 498 U.S. at 92. This Court concluded that statutes of limitations in suits against the Government are not jurisdictional and may be subject to equitable tolling.

Chief Justice Rehnquist, writing for a unanimous Court, explained that "[t]ime requirements in lawsuits between private litigants are customarily subject to equitable tolling." *Id.* at 95. In addition, although waivers of sovereign immunity "must be unequivocally expressed, . . . [o]nce Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.*

This Court therefore announced as a "general rule to govern the applicability of equitable tolling in suits against the Government," that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. The Court viewed this general rule as "likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at

95. This Court has also stated that "the presumption's strength is reinforced by the fact" that the Court will "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (internal quotations and citations omitted).

The Government's heavy insistence that the FTCA time limits are "jurisdictional," *see* Pet'r's Br. 19, and its reliance on a line of decisions reaching back to the 19th Century in which this Court attached the jurisdictional label to time limitations, *see id.* at 22-24, essentially devalues the *Irwin* presumption.

Recognizing that "jurisdiction" has been a "word of many, too many, meanings," *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998), this Court has "tried in recent cases to bring some discipline to the use" of the term. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). Not all statutory requirements that courts in the past typed as "jurisdictional" were truly essential to the court's power to decide the case. In recent cases, this Court has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). "Claim-processing rules," the Court has explained, merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203. Therefore,

> To ward off profligate use of the term "jurisdiction," [this Court has] adopted a

> "readily administrable bright line" for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has "clearly state[d]" that the rule is jurisdictional; absent such a clear statement, we have cautioned, "courts should treat the restriction as nonjurisdictional in character."

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

In this case, the Act contains no clear statement by Congress that non-compliance with the six-month and two-year deadlines deprives the court of adjudicatory power or that Congress intended to prohibit courts from invoking the equitable tolling doctrine. 28 U.S.C. § 2401(b) is addressed to claimants, requiring them to take certain procedural steps at specified times. It "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [court]." *Henderson*, 131 S. Ct. at 1204. Moreover, the section in which Congress confers jurisdiction on federal courts to decide tort claims is 28 U.S.C. § 1346(b)(1), an entirely separate section which does not reference § 2401(b) or time limits. This Court has instead stated that "filing deadlines ordinarily are not jurisdictional; indeed, we have described them as 'quintessential claim-processing rules.'" *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (quoting *Henderson*, 131 S. Ct. at 1203). There is no clear statement in the statute that Congress intended otherwise in this instance.

B. Consent to Liability "To the Same Extent As a Private Individual" Indicates Congressional Intent That Time Limitations Be Subject to Equitable Tolling.

Under the FTCA, "[t]he United States [is] liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Likewise, section 1346(b)(1) grants the district courts exclusive jurisdiction over tort actions against the Government "under circumstances where the United States, if a private person, would be liable." *Id.* at § 1346(b)(1). As Justice Ginsberg, writing for the Court, has noted, "[o]nce the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immunity." *Franconia Assoc. v. United States*, 536 U.S. 129, 141 (2002).

The language used in the statute clearly indicates Congress's intent that equitable tolling apply to the limitations periods. This Court has stated, "It is hornbook law that limitations periods are customarily subject to equitable tolling . . . . Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted); *See also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations").

C. Statutory Command That Claims Not Filed Within Limitations Periods Be "Forever Barred" Does Not Prohibit Courts From Equitably Tolling Time Limits in Appropriate Cases.

The FTCA states that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless [a civil] action is begun within six months after . . . denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

The Government places a great deal of emphasis on Congress's use of the phrase "shall be forever barred." The Government contends that the "unusually emphatic form" of this phrase, *see* Pet'r's Br. 35, and the fact that the same phrase appeared in the 1863 and 1911 Acts, governing Tucker Act suits in the Court of Claims, *see* Pet'r's Br. 22 & n.7, demonstrate that the FTCA's time limits have "jurisdictional effect" and are "not subject to equitable tolling." *Id.* at 28.

This Court has explained that not all "'mandatory prescriptions, *however emphatic*, are . . properly typed jurisdictional.'" *Henderson*, 131 S. Ct. at 1205 (quoting *Union Pacific R.R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 81 (2009)) (emphasis added). Courts, in the past, "including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." *Kontrick*, 540 U.S. at 454. The

Government's efforts to affix the label "jurisdictional" to the Act's time limits do not make a convincing argument.

More importantly, the plain meaning of the phrase "forever barred" is not inconsistent with the doctrine of equitable tolling. A fair reading of § 2401(b) is that any claim that has expired shall not be resuscitated. The focus of the phrase is the end point of the limitations period. The provision does not preclude delaying the start of the limitations period by invoking the discovery rule. *See United States v. Kubrick*, 444 U.S. 111, 123-24 (1979) (discovery rule of accrual applicable in FTCA actions). Nor should it preclude suspending the running of the time limit by equitable tolling, which "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014). In short, as Judge Patrick E. Higginbotham has remarked, equitable tolling "does not resuscitate stale claims, but rather prevents them from becoming stale in the first place." *Perez*, 167 F.3d at 916.

The Act's "emphatic" tone, therefore, does not indicate any congressional intent to treat the limitations periods any differently than other federal statutes of limitations, which "are generally subject to equitable principles of tolling." *Rotella v. Wood*, 528 U.S. 549, 560 (2000).

The Government makes much of the fact that Congress also used the phrase "shall be forever barred" in the Tucker Act, which, this Court held in *John R. Sand & Gravel Co. v. United States*, 552 U.S.

130 (2008), is not subject to equitable tolling. *See* Pet'r's Br. 19-21 & 28. However, as Judge Posner has pointed out, this Court's "opinion in *John R. Sand & Gravel* actually reaffirms the presumption that equitable tolling applies to statutes of limitations in suits against the government, while emphasizing that the presumption is rebuttable." *Arteaga*, 711 F.3d at 833.

Justice Breyer, writing for the majority in *John R. Sand & Gravel*, made clear that the Court's decision regarding the "jurisdictional" status of the Tucker Act time limit was not premised on a reading of the statutory text, but on "[b]asic principles of *stare decisis*" and the line of this Court's prior Tucker Act decisions, dating from the 19th Century. 552 U.S. at 139; *id.* at 134-35 (discussing cases, beginning with *Kendall v. United States*, 107 U.S. 123 (1883), in which the Court denied equitable tolling to a former employee of the Confederate States of America). *See also* Pet'r's Br. 22-24 (discussing the same cases). As Justice Ginsberg later pointed out, the Court decided *John R. Sand & Gravel* "largely on *stare decisis* grounds" and "relied on longstanding decisions of *this* Court typing the relevant prescriptions 'jurisdictional.'" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173-74 (2010) (Ginsburg, J. concurring) (emphasis in original). *See also* Sisk, *supra*, at 1279 (The Court's decision in *John R. Sand & Gravel* "was premised squarely on the principle of stare decisis" and "adhered to a nineteenth century line of cases that regarded this particular statute of limitations as jurisdictional.").

Those concerns are absent here. This Court has not previously addressed whether Congress intended the FTCA time limits to be a "more absolute" type of

jurisdictional limitation that does not permit equitable tolling. *John R. Sand & Gravel*, 552 U.S. at 134. There is no "long line of this Court's decisions left undisturbed by Congress" from which, as the Government suggests, Pet'r's Br. 21, such an intent might be gleaned.

In any event, this Court has found congressional intent to permit equitable tolling in other similarly worded federal statutes of limitations. A provision of the Racketeer-Influenced Corrupt Organizations ("RICO") allows the victims of criminal enterprises to bring a civil action for damages. 18 U.S.C. § 1964. Civil RICO actions are governed by the four-year statute of limitations set out in the Clayton Act, 15 U.S.C. § 15b. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). That section provides that "[a]ny action to enforce a cause of action under [civil RICO] *shall be forever barred* unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (emphasis added). This Court has held that this limitation is subject to equitable tolling where the plaintiff has exercised "reasonable diligence." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-96 (1997).

Thus, the phrase "shall be forever barred" does not amount to a "clear statement" that a claimant's noncompliance with FTCA's time limits deprives the court of jurisdiction. The Government has failed to rebut the presumption that Congress intended to allow courts to apply equitable tolling in appropriate cases.

II. APPLICATION OF EQUITABLE TOLLING TO FTCA TIME LIMITATIONS IS CONSISTENT WITH THE CONGRESS'S COMPENSATORY PURPOSE.

The compensatory purpose of the FTCA is not disputed. On July 28, 1945, a fighter pilot lost his bearings in heavy fog and slammed his B-25 bomber into the Empire State Building. The plane ripped through the 78th and 80th floors, where the offices of the National Catholic Welfare Council were located, causing 14 deaths. Joe Richman, *The Day A Bomber Hit The Empire State Building*, *NPR All Things Considered*, July 28, 2008, *available at*, http://www.npr.org/templates/story/story.php?storyId=92987873.

That tragedy was a catalyst for enactment of legislation waiving the sovereign immunity of the Federal Government for tortious injury, which had been languishing in Congress for two decades. The Federal Tort Claims Act of 1946, was made retroactive to 1945 in order to allow victims of the B-25 crash to seek recovery. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 536 (2008). The statute represented a "legislative pledge of relief to those harmed by their government." *Id.* at 522.

This Court has described the Act as "the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953), *overruled in part on other grounds by*, *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). The Court also noted that the FTCA "was Congress's solution" to the

"notoriously clumsy" device of petitioning Congress for private bills, by "affording instead *easy and simple access to the federal courts* for torts within its scope." *Id.* at 24-25 (emphasis added).

This Court has declared:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955).

This Court has stated it would not undermine the compensatory purpose of Congress by acting "as a self-constituted guardian of the Treasury [and] import[ing] immunity back into a statute designed to limit it." *Id.* at 69. *See also Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 492 (2006) (warning that "unduly generous interpretations of the exceptions [to FTCA liability] run the risk of defeating the central purpose of the statute") (internal quotation omitted).

It should also be kept in mind that the plaintiffs in personal injury actions against the government are often vulnerable victims. Congress's aim of providing easy and simple access to the federal courts for redress is undermined when the Government itself has a hand, intentionally or not, in placing impediments in their path to the courthouse.

One recurring instance involves an individual who is harmed by medical malpractice by a private physician at a private clinic where, unbeknownst to the patient or to the public at large, medical personnel are deemed to be federal government employees for purposes of the FTCA because the clinic receives federal funds.[2] Actions for damages caused by such physicians must be brought under the FTCA against the United States in federal court and subject to the FTCA's time limitations. *See Arteaga*, 711 F.3d at 830. Several courts have pointedly highlighted the inequity of the Government's attempts to take advantage of patients' understandable ignorance of this arrangement. As the Second Circuit stated:

> Patients receiving such treatment are not aware, because they are never told or put on any notice, that the clinics they attend are government-funded or that doctors treating them are government employees. Such an omission does not

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[2] "Pursuant to the Public Health Service Act, as amended by the Federally Supported Health Centers Assistance Act of 1995, 42 U.S.C. § 233(g)-(n) (the Act), the employees of any federally supported health center are deemed to be employees of the United States for purposes of bringing civil actions against them for damages resulting from the performance of medical, surgical, dental or related functions." *Valdez ex rel. Donely v. United States*, 415 F. Supp. 2d 345, 347 (S.D.N.Y. 2006), *vacated*, 518 F.3d 173 (2d Cir. 2008). *See also* Richard W. Bourne, *A Day Late, A Dollar Short: Opening A Governmental Snare Which Tricks Poor Victims Out of Medical Malpractice Claims*, 62 U. Pitt. L. Rev. 87, 88-89 (2000) (While the "goal of this legislation is laudable by not requiring service providers to carry and pay for malpractice insurance, the legislation hurts poor consumers of federally subsidized health care services, the very populations the federal program was meant to help.").

> rise to the level of fraud. Nevertheless, by not formulating a regulation that would require notice to a patient that the doctor rendering service to him is an employee of the United States, the Department of Health & Human Services has created a potential statute of limitations trap in states . . . [that] may provide a longer period of time than the FTCA to file a complaint. The number of cases in which the United States has sought to take advantage of this trap suggests that it is aware of the consequences of its failure to disclose the material facts of federal employment by doctors who might reasonably be viewed as private practitioners.

Valdez ex rel. Donely v. United States, 518 F.3d 173, 183 (2d Cir. 2008).

The Third Circuit has likewise noted the unfairness of dismissing a medical negligence claim as untimely where the injured victim is a child and plaintiff and plaintiff's counsel understandably rely on state laws that toll the statute of limitations for minors:

> We make one final observation about the inequity of the Government's position that should be apparent to all. The only reason that Santos has been barred from bringing her action is that at the time of her injury she was a minor, so her counsel understandably believed that the Pennsylvania statutory tolling rule protecting minors applied in her case. . . .

> Thus, the Government is contending for a result likely to prejudice the weakest and most vulnerable members of our society . . . There is no escape from the reality that the statute of limitations trap to which the court referred in *Valdez* is a perfect vehicle to ensnare children.

Santos ex rel. Beato, 559 F.3d at 203-04.

Congress did not intend the statutory protection extended to physicians to leave those injured by medical negligence without remedy. Indeed, Congress's purpose in waiving the doctrine of sovereign immunity to tort claims was to afford legitimate claimants their day in court. The Government concedes that dismissal of a plaintiff's cause of action in such circumstances is "harsh." Pet'r's Br. 39. The Government contends, however, that "Congress . . . expected that claimants in such cases would seek enactment of a private law—not that courts would grant equitable tolling." *Id.* It makes little sense that Congress would have replaced the widely criticized system of private bills to compensate tort claims with a judicial remedy, *except* for those claimants whose unfair treatment the courts have equitable powers to address.

III. DISTRICT COURTS SHOULD BE AUTHORIZED TO USE EQUITABLE TOLLING IN APPRORIATE CASES TO AVOID DEPRIVATIONS OF CLAIMANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS AND ACCESS TO THE COURTS.

A. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to a Hearing on Their FTCA Claims for Reasons Beyond Their Control.

The cases before this Court present compelling examples of the federal courts' use of traditional equitable tolling to prevent not only inequitable, but unconstitutional outcomes. *United States v. Wong*, No. 13-1074, is an example of a claim that was diligently prosecuted by the plaintiff, but was rendered untimely under 28 U.S.C. § 2401(b) due to circumstances beyond her control.

Ms. Wong filed her administrative claim with the Immigration and Naturalization Service ("INS") on May 18, 2001, seeking damages arising out of conditions of her detention by the agency. The INS should have responded no later than November 19. Anticipating denial, Plaintiff moved for leave to file a civil action by way of an amended complaint containing an FTCA claim "on or after November 20," the first day she was permitted to file. The INS missed its deadline, but denied Wong's claim on December 3, which restarted her six-month period in which to file her civil action. On April 5, 2002, the magistrate judge issued a recommendation to the district court that Wong's motion be granted and that she be permitted

to file her amended complaint. However, the district court did not issue an order adopting that recommendation until June 25, three weeks after the six-month filing deadline had expired. Wong thereafter filed her amended complaint, and the district court granted the Government's motion to dismiss the complaint as untimely. *Wong v. Beebe*, 732 F.3d 1030, 1033-34 (9th Cir. 2013), *cert. granted sub nom.*, *United States v. Wong*, 134 S. Ct. 2873 (2014).

As the court of appeals was careful to emphasize, this result "was not the consequence of any fault or lack of due diligence on Wong's part. If anything, Wong took special care in exercising due diligence." *Id.* at 1052. The court continued,

> As the Magistrate Judge noted, it was "due solely to the delay inherent in the Magistrate Judge system" that no action was taken with respect to [Wong's] requests until the six-month limitations period had already run. Moreover, by informing the parties and the court of her desire to file an FTCA claim well before the filing deadline and requesting leave to do so, Wong fulfilled the notice concern that partially underlies limitations statutes. . . . Wong was entitled to expect a timely ruling on her request to amend, which was made with a great deal of time to spare. . . . In short, Wong's claim was rendered untimely because of external circumstances beyond her control.

Id. at 1052-53. In his separate opinion, Chief Judge Kozinski added by way of explanation that "federal

district courts are chronically overworked, facing volumes of motions and briefing every day. It thus took the court more than seven months to act on this routine motion—a delay Wong didn't cause and couldn't have foreseen." *Id.* at 1054 (Kozinski, C.J., concurring).

Where Congress has established a right and a procedure for vindicating that right, courts may not sit passively while systemic deficiencies rob claimants of the ability to make use of that procedure. This Court so held in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Logan alleged that he was fired because of his physical disability in violation of the Illinois Fair Employment Practices Act, Ill. Rev. Stat., ch. 48, ¶¶ 851 *et seq.*, which also established a comprehensive scheme for adjudicating such claims. When an employee has filed a charge of unlawful discrimination, the Act required the Illinois Fair Employment Practices Commission to convene a factfinding conference within 120 days to obtain evidence, ascertain the position of the parties, and explore the possibility of negotiated settlement. The findings may result in dismissal of the charge or more formal adversary proceedings against the employer. The complainant was entitled to full review by the Commission and, thereafter, to judicial review. *See* 455 U.S. at 424-25.

In Logan's case, however, the Commission failed to schedule a conference until after 120 days had elapsed. The Illinois Supreme Court held that the time limitation was mandatory and failure to comply with the deadline deprived the Commission of jurisdiction to hear Logan's case. *Id.* at 427;

Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 411 N.E.2d 277, 281 (Ill. 1980).

This Court reversed. The Court began by recognizing that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan*, 455 U.S. at 428. "The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as plaintiffs attempting to redress grievances." *Id.* at 429; *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 804 (1996). In particular, the due process clause imposes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." 455 U.S. at 429 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)).

This Court explained that, while the legislature may create statutory rights and may establish reasonable rules for pursuing those rights, the due process clause imposes federal minimum procedural requirements of fairness. *Id.* at 432. "Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest." *Id.* "To put it as plainly as possible," the Court declared, "the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* at 434. The Court took care to note that due process did not require a hearing on the merits of a claim "when the *claimant* fails to comply with a reasonable procedural requirement, or fails to file a timely charge." *Id.* at 434 n.7. But in Logan's case, "it is the *state system itself* that destroys a complainant's property interest, by operation of law, whenever the Commission fails to

convene a timely conference." *Id.* at 436. (emphasis added).[3]

The American Association for Justice submits that the court's authority to equitably toll the time limitations serves as a proper procedural safeguard to prevent such a deprivation of plaintiff's due process rights. Equitable tolling would have prevented just such a deprivation in *Logan*. As Justice Powell pointed out, "One would have expected this sort of negligence by the State to toll the statutory period within which a hearing must be held. The Supreme Court of Illinois, however, *read the statutory terms as mandatory and jurisdictional*." *Id.* at 443 (Powell, J., concurring) (emphasis added).

The American Association for Justice submits that a construction of 28 U.S.C. § 2401(b) that prohibits federal courts from making use of equitable tolling where a plaintiff has been diligent in pursuing her rights and has been deprived of a hearing for reasons that are not within her control would allow results that, as this Court found in *Logan*, violate due process.

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[3] This Court has also held that the constitutional right of access to the courts is implicated where "systemic official action frustrates a plaintiff or plaintiff class in preparing and filing suits." *Christopher v. Harbury*, 536 U.S. 403, 413 (2002). This court recognized an access to court claim whose justification "is to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed." *Id.*

B. District Courts Should Be Permitted to Apply Equitable Tolling to Avoid Depriving Claimants of Their Right to Access to Courts Where Government Actions Resulted in Claimant's Failure to Comply With FTCA Time Limits.

The basis for equitable tolling in *United States v. June*, No. 13-1075, also focuses on conduct by the Federal Government. Because the district court dismissed plaintiff's FTCA cause of action as untimely, this Court "accept[s] as true the allegations of the complaint." *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

The case arises out of a highway tragedy on February 19, 2005 on Interstate 10 in Arizona. A driver lost control, entered the median, passed through the cable median barrier, and crashed into oncoming traffic, killing both the driver and her passenger. Plaintiff June filed an action against the state of Arizona for the wrongful death of the passenger, alleging that the cable median barrier installed at that location was defective and failed to prevent the car from crossing the median as intended. Resp't's Br. 10, *United States v. June*, No. 13-1075 (U.S. Nov. 4, 2014).

In September 2005, the Federal Highway Administration ("FHWA") issued a public memorandum falsely stating that the cable median barrier used on Interstate 10 had been approved as crashworthy. *Id.* For two years, FHWA refused to make personnel available for deposition in plaintiff's state court action. In April 2009 plaintiff's counsel was finally able to depose those employees and "learned

for the first time that the FHWA had knowingly permitted the cable median barrier to be installed and remain in service despite never having passed the FHWA's crashworthiness testing." *Id.* at 10-11.

After denial by FHWA of her administrative tort claim, June filed suit under the FTCA in district court and argued that the two-year limitation should be equitably tolled due to the Government's concealment. The district court granted the Government's motion to dismiss. *Id.* at 12. The court of appeals reversed, holding that federal courts may invoke the doctrine of equitable tolling. This Court should uphold the equitable powers of the courts to avoid dismissal of FTCA claims that would amount to violation of the plaintiff's right to access to the courts.

This Court has made clear that access to the courts is a fundamental constitutional right which this Court has grounded in "the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection, and Due Process Clauses." *Christopher*, 536 U.S. at 415 n.12 (citations omitted).

In that case, Jennifer Harbury, whose husband disappeared in Guatemala, alleged that U.S. State Department officials had falsely denied knowing of her husband's whereabouts and had concealed the CIA's involvement in his detention, thereby depriving her of the ability to file a lawsuit that may have saved his life. *Id.* at 405. Ms. Harbury was ultimately unsuccessful in this Court because her complaint did not describe the underlying cause of action she might have brought nor identify the remedy that might have been awarded. *Id.* at 415.

However, Justice Souter, writing for a unanimous Court, took pains to make clear: Actions by government employees to conceal or misrepresent facts and thereby prevent an individual from filing a legitimate lawsuit in which relief might be awarded constitute a violation of the individual's right of access. The Court's opinion cites with approval a line of decisions by U.S. courts of appeals that demonstrate this principle. *See id.* at 414 & n.7.

In one example, local prosecutors who falsified a death certificate to indicate suicide, rather than murder as the cause of death, may be held to have deprived the victim's family of access to court to file a wrongful death action against the murderer. *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983).

Similarly, where police officers tampered with evidence and gave false statements in order to cover up a police shooting of an unarmed black youth, the Fifth Circuit upheld an award of damages to the victim's family under 42 U.S.C. § 1983 for violation of their right of access to court to pursue a wrongful death action. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

The court stated,

> To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress.

Id. at 1261.

A third decision that this Court looked to is *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). Swekel's husband was fatally injured when he was struck by two cars as he crossed the street. Swekel successfully pursued a wrongful death action against the one driver. However, she alleged, police officers covered up evidence of the identity of the second driver because that driver was the son of a high-ranking police officer. Swekel brought a § 1983 action against the officers for violation of her right to access to courts, alleging that their concealment delayed her discovery of the identity of the second driver until after the wrongful death statute of limitations had passed. *Id.* at 1260-61.

The Sixth Circuit acknowledged that "a state official's actions in covering-up evidence [may amount] to a denial of access to the courts." *Id.* at 1262 (discussing both *Bell* and *Ryland*). However, the court pointed out, "[i]n most instances, state courts can address pre-filing abuses *by tolling the statute of limitations*." *Id.* at 1264. Because Swekel had not given the state court the opportunity to toll the limitation in her case, the court found that she had not been denied her federal constitutional right of access. *Id.*

This Court should recognize that equitable tolling of limitations periods is a tool that should be available to federal courts to suspend the time limitation and allow plaintiff's cause of action to proceed in circumstances such as those present in *United States v. Wong* and *United States v. June* where harsh enforcement of the deadlines would result in depriving plaintiffs of their constitutional rights to due process or access to the courts.

CONCLUSION

For the foregoing reasons, the American Association for Justice urges this Court to affirm the judgments below.

November 12, 2014

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AMICUS CURIAE BRIEF

No. 13-1075

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* ARIZONA ASSOCIATION FOR JUSTICE/ARIZONA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT MARLENE JUNE

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Interest of Amicus Curiae[1]

The Arizona Association for Justice/Arizona Trial Lawyers Association is an organization of over 700 lawyers who represent tort victims in federal and state courts in Arizona and elsewhere. Since its founding in 1964, the Association has sought to preserve and protect the rights of tort victims through continuing legal education and public, trial, and appellate advocacy. The Association has filed amicus curiae briefs at the Arizona Court of Appeals, Arizona Supreme Court, United States Court of Appeals for the Ninth Circuit, and United States Supreme Court.

The Association's members often file claims under the Federal Tort Claims Act. Whether equitable tolling applies to FTCA claims is thus an issue of great importance for our members and their clients. That is especially true for those clients who first try to pursue FTCA claims themselves and federal agents misled them concerning liability or concerning if they could or should file claims. Even in cases where

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than amicus curiae, its members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. The parties have consented to the filing of this brief.

lawyers represent the clients, however, federal agents have regularly concealed and misrepresented facts that delayed filing claims, much as occurred here. Equitable tolling in FTCA cases will counteract the effect of that misconduct and will benefit both the public and the Association's members and clients.

Summary of the Argument

Since 1874, this Court has developed a consistent approach to deciding what circumstances will justify equitably tolling statutes of limitations. That approach can be stated in a series of related principles:

- There can be no equitable tolling unless a claimant is reasonably diligent.
- For a reasonably diligent claimant, a statute of limitations can be tolled either because of fraudulent concealment or because of a particular case's extraordinary circumstances.
- "The virtue of relying on equitable tolling," in fact, "lies in the very nature of such tolling as the exception, not the rule."[2]
- When fraudulent concealment equitably tolls a limitations period, tolling ends when the claimant discovers, or should

[2] *Rotella v. Wood*, 528 U.S. 549, 561 (2000).

have discovered, the claim's relevant facts.

- Equitable tolling presumptively applies to all federal statutes of limitations.
- No substantive versus procedural distinction governs whether to apply equitable tolling.
- Equitable tolling is available even if its application results in expending public funds.
- Congress enacted the two-year limit for filing an FTCA claim with knowledge of these equitable-tolling principles.
- The two-year FTCA limit for filing a claim is a statute of limitations that can be equitably tolled. It is *not* a statute of repose – which cannot be equitably tolled.
- Nothing in the FTCA's text or structure shows an intent to bar applying equitable estoppel to the two-year FTCA statute of limitations.
- A federal statute of limitations can be "jurisdictional" – and not subject to equitable tolling – but *only* if Congress clearly states that intent.
- Clear intent is a bright-line test.
- Even the most rigorous examination of congressional intent and legislative history reveals no clear intent by Congress

to make the two-year FTCA statute of limitations "jurisdictional" – and therefore not subject to equitable tolling.

These principles allow equitable tolling of 42 U.S.C. § 2401(b)'s two-year FTCA statute of limitations for a reasonably diligent claimant when federal agents have committed fraud or other acts of concealment – or when there are extraordinary circumstances justifying equitable tolling. Indeed, equitable tolling presumptively applies to all federal statutes of limitations. That matters because the two-year FTCA statute of limitations is just that, a statute of limitations. It is not a statute of repose. Finally, Congress has never stated any clear intent to make the two-year FTCA statute of limitations jurisdictional. Thus, the two-year FTCA statute of limitations is not jurisdictional and, under proper conditions, is subject to equitable tolling.

Argument

1. Fraudulent concealment can equitably toll a statute of limitations. This Court has gradually clarified that equitable tolling may, in suitable cases, apply to public entities.

This Court has consistently held that fraudulent concealment can equitably toll statutes of limitations. The landmark case is *Bailey v. Glover*, 88 U.S. 342

(1874).[3] In *Bailey*, the issue was whether concealment of fraudulent conduct that formed the basis for a cause of action tolled a federal bankruptcy statute of limitations. This Court held that the statute of limitations did not begin to run until the plaintiff discovered the fraud: (1) where the fraud forming the lawsuit's basis was either concealed or was of such a character as to conceal itself, and (2) where the plaintiff was neither negligent nor guilty of laches in failing to learn of the fraud. *Bailey* rested on the equitable principle that statutes of limitations are designed to prevent fraud – not help fraud succeed.[4]

Cases from 1874 to 2014 have clarified the scope of the *Bailey* equitable-tolling doctrine. Under proper facts, that doctrine can toll federal statutes of limitations for claims by and against the federal government.

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[3] "In 1874, . . . the Supreme Court first recognized that statutes of limitations could also work unjust results in certain cases." Paul G. Zigterman, *The Seventh Circuit's Reformulation of the Equitable Tolling Doctrine*, 1982 U. Ill. L. Rev. 565, 566-67 (1982).

[4] The "'fraudulent concealment' exception has served admirably the purposes for which it was first created" because the "very diversity of human situations to which it must apply has helped to liberate courts from the influence of narrow and artificial tests." John P. Dawson, *Fraudulent Concealment and Statutes of Limitations*, 31 Mich. L. Rev. 875, 918 (1933).

In *Exploration Co. v. United States*, 247 U.S. 435 (1918), for example, the federal government wanted to cancel several land patents for fraud. This Court held that the statute of limitations did not begin to run until discovery of the fraud that gave rise to the federal government's claim for relief, although the statute of limitations had no explicit tolling provision for fraudulent concealment. The Court relied on *Bailey*'s "true rule" that, despite "positive terms," a statute of limitations does not "start to run until after the discovery of the fraud." *Id.* at 446-47.[5]

An important consideration in *Exploration* was the fact that Congress had passed the relevant statute of limitations *after* this Court had adopted the *Bailey* rule. Thus, Congress presumably enacted that statute of limitations with the *Bailey* rule in mind and could not have intended to give immunity to those who concealed their misconduct until the statute of limitations expired. *Id.* at 449. That same principle applies to the 1946 Federal Tort Claims Act and its later amendments, all enacted many decades

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[5] "In some of the other States in which no statutory provision exists upon this subject, it has been held that in the case of fraud, and the willful suppression of the truth, the statute does not begin to run at law until its discovery." John M. Gould & Horace G. Wood, *A Treatise on the Limitation of Actions at Law and In Equity*, Ch. XXII, "Effect of Fraud" 648-49 (3d ed. 1901).

after this Court adopted and began clarifying the doctrine of equitable tolling.

2. This Court has extended equitable tolling to rights that a federal statute has created.

In *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), decided the year the FTCA went into effect, Justice Felix Frankfurter applied the *Bailey* equitable-tolling doctrine to rights created by a federal statute, concluding that: "This equitable tolling doctrine is read into every federal statute of limitations." *Id.* at 397. In *Holmberg*, a bank had closed in 1932. Some of its creditors had sued the bank's known shareholders under Section 16 of the Federal Farm Loan Act. That Act gave them a right to recoup at least some of their losses from the bank's shareholders. The trial court, however, dismissed the lawsuit on procedural grounds without prejudice.

In 1942, the creditors learned that one shareholder had concealed his stock ownership. The creditors sued him the following year. The district court held that the lawsuit could go forward, despite a state-law 10-year limitation statute. The circuit court reversed, holding that the state-law statute was controlling. This Court granted review. The Federal Farm Loan Act discussed in *Holmberg* had no federal statute of limitations. So the federal courts borrowed and applied state statutes of limitation. Justice Frankfurter explained that, in cases of that nature, a

suit in equity could be allowed, although a comparable legal action would be barred.

"And so," Justice Frankfurter stated, "this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Id.* at 397 (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874)).

Holmberg has had staying power. In a 1978 concurrence, Chief Justice Warren Burger relied on it when he stated that: "The authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds is a well-established part of our jurisprudence." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 339 (1978) (Warren, C.J., concurring). And in a 2001 opinion, Justice Ruth Bader Ginsburg confirmed that *Holmberg* "stands for the proposition that equity tolls the statute of limitations in cases of fraud or concealment." *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001).

3. Equitable tolling does not depend on a substantive versus procedural distinction.

The Court has occasionally heard arguments that there is a substantive versus procedural distinction that may govern equitable tolling. But this Court has

not found that distinction helpful. The leading case on that point is *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). In *Burnett*, a Kentucky claimant sued in Ohio state court under the Federal Employers' Liability Act. The trial court dismissed the suit because the claimant had filed it in the wrong court. Although the statute of limitations had expired, the claimant filed an FELA lawsuit in Ohio federal district court.

The Ohio federal district court dismissed the second lawsuit under the FELA statute of limitations, which stated: "That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. The Sixth Circuit affirmed, reasoning that because the statute of limitations was part of the same federal law that created the right being limited, the limitation was "substantive" and not "procedural." This Court granted review – and then reversed and remanded to the district court. *Id.* at 424-25.

Justice Arthur Goldberg explained that classifying a statute of limitations as substantive or procedural "does not determine whether or under what circumstances the limitation period may be extended." *Id.* at 426-27. Justice Goldberg added that, although "the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does

not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Id.* at 427 n. 2. As a result, "the 'substantive'-'procedural' distinction would seem to be of little help in deciding questions of extending the limitation period." *Id.*

The basic inquiry was whether tolling the statute of limitations under given circumstances effectuated a congressional purpose. *Id.* at 427. Justice Goldberg stated that, to determine congressional intent, the Court "must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Id.* Tolling was proper in light of FELA's "humane and remedial" purpose and the circumstances of the case. *Id.* at 427-28. The policy of finality inherent in a statute of limitation, Justice Goldman wrote, is "frequently outweighed" when "the interests of justice require vindication of the plaintiff's rights." *Id.* at 428.

The *Bailey* rule's expansion continued with *Honda v. Clark*, 386 U.S. 484 (1967). In *Honda*, claimants of property held under the federal Trading with the Enemies Act had filed late administrative claims because of language, cultural, and comprehension difficulties and because of complex claim instructions. *Id.* at 489-92. Justice John Harlan concluded that it was "much more consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress, to preserve petitioners' cause of action." *Id.* at 501.

4. Equitable tolling against the federal government is possible even if the federal statute of limitations to be tolled is part of a statute providing for substantive governmental liability.

The next important step in clarifying the *Bailey* equitable-tolling-based-on-concealment doctrine came in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). That case concerned applying the Sherman Act's statute of limitations. This Court confirmed – as it had done in *Burnett* (1965) – that the test for determining whether a statute of limitations should be tolled is not whether the time limit is substantive or procedural. The test is whether, "in a given context," tolling was "consonant with the legislative scheme." *Id.* at 557-58.

American Pipe held that, "in cases where the plaintiff has refrained from commencing suit during the period of limitation because of inducement by the defendant, or because of fraudulent concealment, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant." *Id.* at 559. Thus, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.*

Several post-*American Pipe* opinions confirmed that statutory claim-filing deadlines are generally subject to equitable tolling. Those opinions include *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."); *United States v. Locke*, 471 U.S. 84, 94 n. 10 (1985) ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling.").

5. Mere absence of prejudice is an insufficient basis for applying equitable tolling.

In 1984, this Court considered whether equitable tolling was proper where the plaintiff had failed to show more than that the defendant would suffer no prejudice by applying the doctrine. In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), a former employee sued his former employer for employment discrimination. The federal district court dismissed the action. After the court of appeals reversed, this Court granted review and held the complaint was filed too late. This Court refused to apply equitable tolling because the plaintiff had failed to establish any of the factors supporting equitable tolling, other than lack of prejudice to the defendant. *Id.* at 151-52.

6. Equitable tolling against the federal government is possible even if that results in expending public funds.

In *Bowen v. City of New York*, 476 U.S. 467 (1986), this Court confronted the issue of whether equitable tolling was proper if applying that doctrine might result in paying public funds. In *Bowen*, Social Security claimants filed a class action in federal court, claiming that an allegedly illegal internal policy of the Secretary of Health and Human Services had denied benefits to which they were entitled. The district court certified the class, a ruling the court of appeals affirmed.

The question in *Bowen* was whether the class properly included claimants who, misled by the government's secretive conduct, had admittedly not filed their claims within the 60-day "statute of limitations" for presenting a claim. *Id.* at 476, 481.[6] Honoring those late claims would result in paying money from the public treasury. But Justice Lewis F. Powell, Jr., wrote that: "We decline to hold that the doctrine of equitable tolling is so limited. When application of the doctrine is consistent with Congress' intent in

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[6] *Bowen*, "held that the application of a secret, internal policy by the Secretary of Health and Human Services in adjudicating Social Security Act claims equitably tolled the limitations periods for seeking administrative or judicial review." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 123 (1988).

enacting a particular statutory scheme, there is no justification for limiting the doctrine to cases that do not involve monetary relief." *Id.* at 479.[7]

Like the FTCA's two-year statute of limitations, *Bowen*'s claims-processing statute of limitations was a "mechanism" letting Congress "move cases to speedy resolution" in a system annually processing a multitude of claims. *Id.* at 481. Under *Bowen*'s facts, including the federal government's secretive conduct that had prevented claimants from knowing their rights were violated, tolling the statute of limitations was appropriate. *Id.* at 481-82.

7. Equitable tolling requires that a claimant exercise reasonable diligence.

Further clarification on equitable tolling came in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989). In that case, property owners filed an action against a county for allegedly violating the federal Resource Conservation and Recovery Act. The claimant failed to notify the EPA and others about its intent to sue at

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[7] In *Bowen*, "a unanimous Court rejected the argument that the equitable tolling doctrine should be confined to cases in which relief will produce no adverse impact on the federal fisc." Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of its Own Regulations or other Misconduct*, 44 Admin. L. Rev. 653, 723 (1992).

least 60 days before filing suit. This Court held that the 60-day notice requirement was a mandatory condition precedent to filing the RCRA lawsuit – and failure to meet that requirement required dismissal.

The claimant argued that RCRA's 60-day requirement was not jurisdictional but was subject to equitable tolling. *Id.* at 27. The 60-day notice-of-intent-to-sue requirement in *Hallstrom*, however, was not a statute of limitations that was triggered by the violation giving rise to the action. Instead, RCRA claimants had "full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days." *Id.* Thus the equitable-tolling doctrine that generally applied to statutes of limitations would not apply to the RCRA 60-day requirement. More important, the claimants had failed to take the minimal steps necessary to preserve their claims. Thus, equitable tolling was unnecessary. *Id.*[8]

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[8] "As a matter of policy, the requirement of due diligence is necessary to protect defendants' legitimate interests." Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L.J. 829, 878 (1983). Of course, an analysis of due diligence must take into account government efforts to nullify that diligence through concealment. *See, e.g.*, David L. Abney, *For Whom the Statute Tolls: Medical Malpractice under the Federal Tort Claims Act*, 61 Notre Dame L. Rev. 696, 714 (1986) ("Government agents will often

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Reasonable diligence was a strong factor underlying the treatment of equitable tolling in *Rotella v. Wood*, 528 U.S. 549 (2000). In that case, the plaintiff had failed to exercise reasonable diligence to uncover a pattern of wrongdoing in a Racketeer Influenced and Corrupt Organizations Act claim. Thus the lower courts held that the plaintiff's RICO lawsuit was untimely.

Writing for a unanimous Court, Justice David Souter stated that "federal statutes of limitations are generally subject to equitable principles of tolling, and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty." *Id.* at 560-61 (citation omitted). Although the plaintiff had not been sufficiently diligent in *Rotella*, Justice Souter ended the opinion by remarking that: "The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule." *Id.* at 561.

8. The same rebuttable presumption of equitable tolling that applies to lawsuits against private defendants also applies to lawsuits against the federal government.

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court upheld equitable tolling of

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perpetuate the plaintiff's ignorance of the critical tort facts.").

the rule that an employment-discrimination action had to be brought against the federal government within 30 days of an EEOC notification. Once Congress waived sovereign immunity, Chief Justice William H. Rehnquist explained, "making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Id.* at 95. As a result, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96.[9]

"Congress," Chief Justice Rehnquist added, "may provide otherwise if it wishes to do so." *Irwin*, 498 U.S. at 96. Although the Court had sparingly extended equitable relief, it *had* "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* (footnotes omitted).

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[9] In *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002), Justice Sandra Day O'Connor reaffirmed that: "In suits against the United States . . . there is a rebuttable presumption that equitable tolling under federal law applies to waivers of the United States' immunity."

Finally, since congressional time limits in a lawsuit against the federal government necessarily involve waiving sovereign immunity, courts may apply no more favorable tolling doctrine against the federal government than they apply in lawsuits between private parties. *Id.* Because all the petitioner could show in *Irwin* was "at best a garden variety claim of excusable neglect," however, equitable tolling in that case was inappropriate. *Id.*

9. Equitable tolling does not apply against the federal government for tax-refund claims under the statute of limitations for those claims.

In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court placed a unique limit on equitable tolling against the federal government. In *Brockamp*, the issue was whether federal courts could equitably toll the statutory time limits for filing tax refund claims. *Id.* at 348. Justice Stephen Breyer explained that the tax-refund statute of limitations, 26 U.S.C. § 6511, had established its time limits "in unusually emphatic form" and "in a highly detailed technical manner that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id.* at 350. In addition, 26 U.S.C. § 6511 reiterated its limits "several times in several different ways." *Id.* at 351.

Because of 26 U.S.C. § 6511's structure and scope, applying equitable tolling would require tolling both that statute's procedural time limits and tolling

that statute's unique substantive limits on the amount of any refund. Based on the statute's detail, technical language, explicit exceptions, and procedural and substantive limits, Justice Breyer concluded that: "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Id.* at 352.

Moreover, for this unique statute of limitations, equitable tolling would result in countless problems, including innumerable late claims and requests for equitable tolling. Those considerations indicated that "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires." *Id.* at 353. Thus, *Brockamp* concluded that Congress did not intend to apply equitable tolling to 26 U.S.C. § 6511.

But equitable tolling can still sometimes apply against the IRS. In *Young v. United States*, 535 U.S. 43 (2002), for instance, the issue was whether the three-year lookback period that let the IRS collect taxes against a debtor was tolled during the pendency of a debtor's earlier Chapter 13 proceeding. This Court held that equitable tolling was available. "The three-year lookback period," Justice Antonin Scalia wrote, "is a limitations period subject to traditional principles of equitable tolling." *Id.* at 47. Because there was nothing in the Bankruptcy Code that precluded equitable tolling of the lookback period, the

district court had properly applied equitable tolling. *Id.*

"It is hornbook law," Justice Scalia stated, "that limitations periods are 'customarily subject to equitable tolling.'" *Id.* at 49 (*quoting Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990)). That is true "unless tolling would be 'inconsistent with the text of the relevant statute.'" *Id.* (quoting *United States v. Beggerly*, 524 U.S. 38, 48 (1998)). "We have acknowledged, however, that tolling might be appropriate in other cases." *Id.*

10. In 2005, this Court announced a two-part equitable-tolling test: (1) the claimant has been pursuing the claimant's rights diligently, and (2) some extraordinary circumstance stood in the claimant's way. That two-part test coexists with the *Bailey v. Glover* (1874) fraudulent-concealment test for equitable tolling.

In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), a habeas corpus petitioner claimed he was entitled to equitable tolling of the limitations period for seeking relief under the Antiterrorism and Effective Death Penalty Act. The petitioner, however, had exceeded all deadlines and had failed to establish he had pursued his claims diligently.

Chief Justice William H. Rehnquist announced a two-part standard for equitable tolling: "Generally, a litigant seeking equitable tolling bears the burden of

establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Id.* at 418. Because the petitioner had failed to act diligently, there could be no equitable tolling. *Id.* at 419.

In *Lawrence v. Florida*, 549 U.S. 327, 337 (2007), another habeas corpus case, this Court applied the same two-part test, and refused to allow equitable tolling for a petitioner who had failed to make a factual showing that his supposed mental capacity existed, which might have been a qualifying extraordinary circumstance. The arguments that there was legal confusion and that his lawyer had mistakenly calculated the limitations period were also insufficient to justify equitable tolling. *Id.* at 336-37.

In *Holland v. Florida*, 560 U.S. 631, 634 (2010), this Court definitively held that "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling." Justice Stephen Breyer reiterated that the proper test for determining whether to apply equitable tolling was whether: (1) the petitioner had pursued his or her rights with reasonable diligence and (2) some extraordinary circumstance stood in his or her way and prevented timely filing. *Id.* at 649, 653. This Court applied that same standard in *Ryan v. Gonzales*, 133 S.Ct. 696, 704 n. 6 (2013) (habeas corpus case).

In 2012, it became clear that the two-part, equitable-tolling test was not confined to habeas corpus cases. Instead, it coexisted with the fraudulent concealment

basis for applying equitable tolling that this Court had first applied in *Bailey v. Glover*, 88 U.S. 342 (1874).

The case making that point was *Credit Suisse Securities (USA) LLC v. Simmonds*, 132 S.Ct. 1414 (2012), which involved the two-year statute of limitations for an SEC cause of action. In that case, Justice Antonin Scalia restated and applied the *Pace* rule that: "'Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way.'" *Id.* at 1419 (*quoting Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

"It is well established," Justice Scalia added, "that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff." *Id.* at 1420. Thus, the statute of limitation is tolled "until discovery of the fraud 'where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part.*'" *Id.* (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874) (emphasis added)). That approach is consistent with the principle that equitable tolling often involves "fact-intensive disputes" on such matters as who knew or should have known what – and when that knowledge existed. *Credit Suisse* at 1421.

Justice Scalia further explained that letting tolling extend beyond the point where a "plaintiff is aware or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: 'to protect defendants against stale or unduly delayed claims.'" *Id.* at 1420 (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (emphasis in original)).

This Court next applied the *Pace* two-part test for equitable tolling in *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224 (2014). *Lozano* concerned the one-year period for seeking return of an abducted child under the Hague Convention. "As a general matter," Justice Clarence Thomas explained, "equitable tolling pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Id.* at 1231-32. Because the equitable-tolling doctrine "effectively extends an otherwise discrete limitations period set by Congress, whether equitable tolling is available is fundamentally a question of statutory intent." *Id.* at 1232.

Justice Thomas added that the inquiry into whether equitable tolling may apply to a federal statute of limitations starts with the principle that Congress passes laws "'against a background of common-law adjudicatory principles.'" *Id.* at 1232 (quoting *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991)). One of those common-law adjudicatory principles is equitable tolling, "a long-established feature

of American jurisprudence derived from 'the old chancery rule.'" *Id.* (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Thus, this Court presumes "that equitable tolling applies if the period in question is a statute of limitations and if tolling is consistent with the statute." *Id.*

Justice Thomas observed that "Congress is presumed to incorporate equitable tolling into federal statutes of limitations because equitable tolling is part of the established backdrop of American law." *Id.* But this Court had never applied that equitable-tolling presumption to treaties, which makes sense, because treaties are made with nations that would rarely, if ever, recognize equitable tolling. *Id.* at 1232-33. Moreover, this Court had only applied the presumption in favor of equitable tolling to statutes of limitations. *Id.* at 1234.[10]

The petitioner in *Lozano* also argued that applying equitable tolling would be good public policy because it would discourage concealment and other tactics that hide a child's location. "That contention," Justice Thomas countered, "mistakes the nature of

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[10] *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1975 (2014) likewise held that: "Tolling, which lengthens the time for commencing a civil action in appropriate circumstances, applies when there is a statute of limitations; it is, in effect, a rule of interpretation tied to that limit." (Footnote omitted.)

equitable tolling as this Court has applied it. We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose." *Id.* at 1236. Instead, this Court applies equitable tolling only if it determines that the drafters of the relevant enactment – in this case, the multinational drafters of the Hague Convention – intended that result. *Id.* Because there was no such intent, there was no basis for applying equitable tolling. *Id.*

11. Absent fraudulent concealment or other extraordinary circumstances, equitable tolling does not apply to a statute of limitations that only starts at a tort's discovery. Nor does equitable tolling apply to a statute of repose.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court provided further clarification of the reach of equitable tolling. In *Lampf*, investors sued a law firm to recover for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and under Rule 10b-5. The claimants contended that the statutes of limitations for their claims were equitably tolled.

Writing the majority opinion, Justice Harry Blackmun stated that time requirements in lawsuits are customarily subject to equitable tolling. Indeed, in the usual case, Justice Blackmun acknowledged that "'where the party injured by the fraud remains in

ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Id.* at 363 (*quoting Bailey v. Glover*, 88 U.S. 342, 348 (1874)).

Although Justice Blackmun referred to equitable tolling as a "venerable principle," he wrote that the doctrine was "fundamentally inconsistent" with the one-year and three-year statutes of limitations for the securities claims at issue in the case. The three-year statute of limitations was a statute of repose – setting a non-extendable period for filing any lawsuit. Since it was a statute of repose, equitable tolling was unavailable. The initial one-year statute of limitations began after discovery of the facts constituting the securities violations. Thus, it had its own internal discovery-rule tolling mechanism, and equitable tolling was not needed. *Id.*

That same reasoning supported the outcome in *United States v. Beggerly*, 524 U.S. 38 (1998). In that case, claimants sued to vacate a consent decree in an earlier quiet-title action that the federal government had filed. One of the main issues was whether equitable tolling was available in an action brought under the federal Quiet Title Act. "Equitable tolling is not permissible," Chief Justice Rehnquist wrote, "where it is inconsistent with the text of the relevant statute." *Id.* at 48. The Quiet Title Act's statute of limitations provided that it would not begin to run until the

plaintiff "knew or should have known of the claim of the United States."[11] Thus, the Quiet Title Act's statute of limitations "has already effectively allowed for equitable tolling." *Id.* Because of that fact, "and the unusually generous nature of the QTA's limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted." *Id.* at 48-49.

The latest case to deal with the non-applicability of equitable tolling against a statute of repose is *CTS Corporation v. Waldburger*, 134 S.Ct. 2175 (2014). That case concerned 42 U.S.C. § 9658, a provision of CERCLA[12] that preempts state statutes of limitations for certain pollution-related state-law torts. Section 9658 implements a "discovery rule" under which state statutes of limitations for certain pollution-related actions start to run when a plaintiff discovers, or reasonably should have discovered, that

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[11] *Id. See* Quiet Title Act, 28 U.S.C. § 2409a(g) ("Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.").

[12] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 94 Stat. 2767, *as amended*, 42 U.S.C. §§ 9601, *et seq.*

a contaminant caused the injury. "A person who is exposed to a toxic contaminant may not develop or show signs of resulting injury for many years, and so Congress enacted § 9658 out of concern for long latency periods." *Id.* at 2180.

Writing for the majority, Justice Anthony Kennedy explained that the issue was not whether Section 9658 preempted state statutes of limitations. That was a given. The issue was whether Section 9658 also preempted state statutes of repose. *Id.* Indeed, the outcome of the case turned on whether Section 9658 made a distinction between "state-enacted statutes of limitations and statutes of repose." *Id.* at 2182.

For tort cases, statutes of limitations and of repose are similar. After all, both protect defendants and serve the purposes of finality by limiting the duration of tort liability. Thus, both types of statutes can bar a plaintiff's lawsuit, with time as "the controlling factor." *Id.* But there are dispositive differences. First, the time periods are measured from different points. A statute of limitations creates a time limit starting on the date the claim accrues. For a tort case, that is the date the plaintiff can first sue or make a legal claim, usually when the injury occurred or when the plaintiff discovers the injury.

A statute of repose, on the other hand, places an outer limit on the right to sue not measured "from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id.* For instance, in a product-liability case,

the statute of repose might start when the defendant manufacturer first built a defective product, and could expire before the plaintiff is injured or discovers that there has been an injury. It could expire before the plaintiff is even born.

A statute of repose is thus a cutoff date – an absolute bar to any claim or lawsuit. *Id.* at 2182-83. That is, a statute of repose "mandates that there shall be no cause of action beyond a certain point, even if no cause of action has yet accrued. Thus, a statute of repose can prohibit a cause of action from coming into existence." *Id.* at 2187. "A statute of repose," therefore, "may preclude an alleged tortfeasor's liability before a plaintiff is entitled to sue, before an actionable harm ever occurs." *Id.*

The purposes also differ. Statutes of limitations encourage diligence and protect defendants from the "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Id.* at 2183 (quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)). Statutes of repose, on the other hand, implement a legislative judgment that some defendants will have complete immunity after a specific period of time unrelated to a claim's accrual. *Id.*

For equitable-tolling purposes, there is a "central distinction between statutes of limitations and statutes of repose." *Id.* Generally, statutes of limitations can be subject to equitable tolling and, generally,

statutes of repose cannot. *Id.* That is, statutes of repose "generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *Id.* As Wright and Miller explain, a "'critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling.'" *Id.* (quoting 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1056 at 240 (3d ed. 2002)).

Determining whether 42 U.S.C. § 9658 preempts statutes of limitations only or also preempts statutes of repose was an inquiry that had, in the first instance, to be "grounded in the statute's text and structure." *Id.* at 2185. "Congressional intent," as Justice Kennedy remarked, "is discerned primarily from the statutory text." *Id.* Based on Section 9685's text and structure, Justice Kennedy concluded that Section 9685 was limited to preempting state statutes of limitations and not to preempting state statutes of repose. *Id.* at 2188. The concurrence agreed that "ordinary principles of statutory construction demonstrate that 42 U.S.C. § 9658 pre-empts only statutes of limitation and not statutes of repose." *Id.* at 2189.

The importance of *CTS Corporation* for the *June* case is not the ultimate conclusion about the scope of 42 U.S.C. § 9658, but the distinction between statutes of repose (not subject to equitable tolling) and statutes of limitations (presumptively subject to equitable tolling).

12. The penultimate question for this case is whether the two-year period for filing an administrative tort claim against the United States is a statute of limitations or a statute of repose.

June involves timeliness of an administrative tort claim against the United States. The normal limitation period for filing an administrative tort claim against the United States is two years after the cause of action has accrued. That two-year tort-claim time limit appears in 28 U.S.C. § 2401(b), which provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

This Court has somewhat clouded the waters by occasionally using "repose" as a synonym for "limitation" when describing statutes of limitation. For instance, in *United States v. Kubrick*, 444 U.S. 111, 117 (1979), an FTCA case, this Court referred to statutes of limitations as "statutes of repose" which, although they give "plaintiffs what the legislature deems a reasonable time to present their claims," and "protect defendants and the courts from having to deal with cases in which the search for truth may be

seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." But *Kubrick*'s context indicates that this Court was using "repose" to mean "limitation."

For equitable tolling, this Court draws a clear distinction between statutes of limitation and statutes of repose. The first case doing that was *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). In describing a three-year statute of limitations for a security-law action, Justice Harry Blackmun referred to it as a statute of repose because it set a non-extendable period for filing any lawsuit. And because it was a statute of repose and not a statute of limitation, equitable tolling was unavailable. *Id.* at 363.

As discussed above, a more recent case dealing with the difference between statutes of limitations and statutes of repose is *CTS Corporation v. Waldburger*, 134 S.Ct. 2175 (2014). In that case Justice Anthony Kennedy explained that a statute of limitations starts when the cause of action accrues but a statute of repose starts from the date the defendant commits the relevant culpable act. *Id.* at 2182-83. The important point is that a statute of limitations is subject to equitable tolling and a statute of repose is not. *Id.* at 2183.

The distinction this Court made in *Lampf* and *CTS Corporation* is consistent with the standard meanings of "statute of limitations" and "statute of

repose." The world's most respected legal dictionary defines statute of limitations as "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued." *Black's Law Dictionary* 1546 (9th ed. 2009). On the other hand, it defines "statute of repose" as "a statue barring any suit that is brought after a specified time since the defendant acted (such as by designing or manufacturing a product) even if this period ends before the plaintiff has suffered a resulting injury." *Id.*

Under those definitions, the two-year administrative period for filing an FTCA tort claim is a statute of limitations. That is confirmed by 42 U.S.C. § 2401(b)'s words, which specify that the two-year limit starts *after* the claim "accrues." The two-year FTCA statute is therefore not a statute of repose. Instead, it is a statute of limitations and subject to equitable tolling.

13. The ultimate question for this case is whether the two-year statute of limitations is "jurisdictional." Because that statute of limitations is not jurisdictional, equitable tolling is possible.

The final question is whether, for equitable-tolling purposes, 42 U.S.C. § 2401(b) is "jurisdictional." The parties and the Ninth Circuit have attached great significance to the "jurisdictional" issue in this case. But jurisdictional concerns have traditionally played little role in this Court's analysis of the

propriety of applying equitable tolling. That's not to say that jurisdiction has not been mentioned in connection with equitable tolling. It has been mentioned – but usually in passing and with scant to no analysis.

For instance, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) mentioned that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 n. 6 (1984) contained a jurisdictional aside nearly identical to the one made in *Zipes*. There was some discussion of the "jurisdictional" issue in *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989), but the opinion held that it "need not determine whether [the subject limitations statute] is jurisdictional in the strict sense of the term."

The jurisdictional question received more attention in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). In that case, the issue was whether equitable tolling might be asserted in the context of a lawsuit against the federal government in the United States Court of Federal Claims. The statute of limitations in that case was 28 U.S.C. § 2501, which provides that: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

Writing the majority opinion, Justice Stephen Breyer noted that there are some statutes of limitations that seek to achieve more than timeliness – that seek "to achieve a broader system-related goal." *Id.* at 133. Those statutes of limitations include statutes that:

- promote judicial efficiency,
- facilitate administration of claims, or
- limit the scope of a governmental waiver of sovereign immunity. *Id.*

Justice Breyer stated that such "more absolute" statutes of limitations are "sometimes referred to" as "'jurisdictional.'" *Id.* at 134. In that regard, Justice Breyer wrote that the court-of-claims statute of limitations was one that the Court had "long interpreted" as being one of the "more absolute" sort of statutes of limitations. *Id.* "Over the years," Justice Breyer added, "the Court has reiterated in various contexts this or similar views about the more absolute nature of the court of claims limitations statute." *Id.* at 135. Indeed, the Court had specifically held that the court-of-claims statute of limitations was jurisdictional and therefore "not susceptible to equitable tolling." *Id.* at 136. *John R. Sand & Gravel*, however, provided no bright-line test for deciding whether a statute of limitations is "jurisdictional."

The leading case on the jurisdictional issue is *Sebelius v. Auburn Regional Medical Center*, 133 S.Ct. 817 (2013). *Sebelius* concerned the time for

healthcare providers to file an administrative appeal from an initial determination of reimbursement due to them for inpatient services rendered to Medicare beneficiaries. A healthcare provider dissatisfied with that determination has 180 days to appeal to an administrative body called the Provider Reimbursement Review Board ("Board"). The Board, however, may extend the 180-day deadline "for good cause, up to three years." *Id.* at 821.

Delivering the opinion for a unanimous Court, Justice Ruth Bader Ginsburg explained that "the presumption in favor of equitable tolling does not apply to administrative appeals of the kind here at issue." *Id.* at 822. Justice Ginsburg also noted, however, that the Board could extend the appeal time to three years for good cause and that the 180-day deadline for filing an administrative appeal was not "jurisdictional." *Id.* at 821-22.

Justice Ginsburg advised exceptional care when classifying a rule as jurisdictional, because of the consequences arising from that classification. "Characterizing a rule as jurisdictional renders it unique in our adversarial system," after all, because a jurisdictional objection can be raised at any time, resulting in a waste of resources and prejudice to other litigants. *Id.* at 824.

As a result, this Court has "adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional." *Id.* The bright-line test is whether Congress has clearly

stated that the rule is jurisdictional. If there is no clear statement, this Court has cautioned that 'courts should treat the restriction as nonjurisdictional in character.'" *Id.* (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006)).[13]

The usual presumption of equitable tolling was "inapt in the context of providers' administrative appeals under the Medicare Act." *Id.* at 827. That was especially true because of the possibility of a good-cause, three-year extension of the filing deadline. *Id.* at 827-28. Justice Sonia Sotomayor concurred, but cautioned that "we have never suggested that the presumption in favor of equitable tolling is generally inapplicable to administrative deadlines." *Id.* at 829.

The two-year statute of limitations for filing an FTCA claim, unlike the Medicare statute of limitations in *Sebelius*, does not have a built-in good-cause mechanism for extending it. The two-year FTCA statute is, instead, a standard statute of limitations starting upon accrual of the tort claim. And although calling the FTCA two-year statute of limitations "administrative" is accurate in the sense that the

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[13] Neither the FTCA's words "nor its legislative history indicates any intent for § 2401(b) to be construed differently from other statutes of limitations." Elana Wexler, *Section 2401(B) Reconfigured:* Irwin v. Department of Veterans Affairs *Leads to the Right Result for the Wrong Reasons*, 74 Fordham L. Rev. 2927, 2960 (2006).

claim is made to a federal administrative agency, the FTCA two-year statute of limitations bars any lawsuit if the claim is untimely. The two-year FTCA statute of limitations is thus both a claim-ending and a lawsuit-ending statute.

Finally, the FTCA two-year statute of limitations is not jurisdictional under the *Sebelius* bright-line test because Congress has never "clearly stated that the rule is jurisdictional." *Id.* at 824.[14] The Solicitor General's brief devoted thousands of words to examining legislative history and congressional intent without uncovering any "clear statement" by Congress that the FTCA two-year statute of limitations is jurisdictional. Because there is no clear statement of congressional intent, this Court will not treat that statute of limitations as "jurisdictional." Therefore, under proper conditions, such as those in the present case, the FTCA two-year statute of limitations can be equitably tolled.

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[14] Indeed, "none of the . . . legislative materials informs our understanding" on what circumstances toll running of the FTCA statute of limitations. Kent Sinclair & Charles A. Szypszak, *Limitations of Action under the FTCA: A Synthesis and Proposal*, 28 Harv. J. on Legis. 1, 8-9 (1991).

Conclusion

This Court should affirm the Ninth Circuit's approval of the application of equitable tolling in this matter.

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AMICUS CURIAE BRIEF

No. 13-1075

In the Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CLINIC FOR LEGAL ASSISTANCE TO SERVICEMEMBERS AND VETERANS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE* [1]

The Clinic for Legal Assistance to Servicemembers and Veterans (CLASV) is dedicated to providing active-duty members of the armed forces, their families, and veterans with free legal representation in matters of clear injustice or where they cannot retain counsel without undue hardship. CLASV was established in 2004 at George Mason University School of Law, and has assisted hundreds of servicemembers, their families, and veterans in matters involving civil litigation, family law, landlord-tenant disputes, military law, contract issues, administrative law, and bankruptcy in federal and state forums. The services rendered by CLASV have a direct bearing on the readiness, quality of life, and morale of the armed forces and their families.

In 2006, CLASV students were *amici curiae* in the only brief from the law school community that supported, against constitutional attack, the Solomon Amendment. That Amendment provides an incentive for law schools to allow recruiters from the military on campus. It was upheld by a unanimous decision of this Court. *See Rumsfeld v. Forum for*

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

Academic and Institutional Rights, Inc., 547 U.S. 47 (2006).

CLASV has received written support and recognition from the President of the United States, United States Senators, a United States Congressman, the General Counsel of the Department of Defense, the Judge Advocate General of the Army, the Staff Judge Advocate at Marine Corps Base Quantico, and all five legal assistance policy chiefs of the armed forces. CLASV has been featured in essays appearing in the *National Law Journal*, *Business Law Today*, and the *Richmond Times-Dispatch*, and in articles in the *Washington Post*, the *Fairfax Times*, the *Legal Times*, *Stars and Stripes*, and the *Los Angeles Daily Journal*.

Pursuant to its organizational mission, CLASV assists servicemembers, their families, and veterans with the investigation and presentation of administrative claims under the Federal Tort Claims Act (FTCA). In CLASV's experience, servicemembers and their families often encounter multiple and profound difficulties in meeting the FTCA's two-year deadline for presenting administrative claims. Many of these difficulties—some of which are unique to the Military Health System (MHS) and military culture—implicate, directly, the equitable tolling doctrine that is at issue in this case. CLASV accordingly submits this brief in support of Respondent to describe the limited but critical role that the equitable tolling doctrine plays

in protecting the rights and interests of military families.

SUMMARY OF ARGUMENT

In the United States, the MHS operates a health care delivery system that includes 41 military hospitals and hundreds of military clinics serving active military, veterans, and their dependents. The MHS also supports a network of private sector health care providers under its health insurance system, Tricare. Overall, the MHS serves approximately 9.6 million active-duty servicemembers, veterans, and their eligible family members and survivors. With a budget that exceeds $50 billion, the MHS is one of the largest health systems in the nation. *See* Fact Sheet: Overview of the Department of Defense's Military Health System; *see also* Final Report to the Secretary of Defense, Military Health System Review, p. 2 (August 2014).

Due to the structure and incentives of military insurance plans, such as Tricare, military families find it advantageous to use the MHS for care and treatment. Unfortunately, MHS care is often sub-standard—especially in maternity care and surgery. *See* Sharon LaFraniere and Andrew W. Lehren, *In Military Care, a Pattern of Errors but Not Scrutiny*, N.Y. Times (June 28, 2014) ("[B]y several measures considered crucial barometers of patient safety, the military system has consistently had higher than

expected rates of harm and complications in two central parts of its business – maternity care and surgery.").

To that end, a recent comprehensive review by the Department of Defense (DoD) confirmed instances of substandard care, particularly in maternity care and surgery. *See* Fact Sheet: The Department of Defense's 90-Day Review of the Military Health System. The DoD found that "on several specific measures (to include postpartum hemorrhage and undefined neonatal trauma), the MHS is performing below the [National Perinatal Information Center] benchmarks" and that "[t]he surgical morbidity (surgical complications) rate was statistically significantly below average in eight of 17 participating [military treatment facilities] in 2013." *Id.*; Final Report to the Secretary of Defense, Military Health System Review, pp. 104, 111 (August 2014).

Those who receive substandard care from military hospitals and clinics often lack ready access to lawyers and can be unaware of their rights. Even with assistance from CLASV's members, the information needed to substantiate the existence and value of a claim is hard to acquire. Healthcare claims, in particular, present challenges because information on treatment is often in the possession of the same hospitals and clinics that are alleged to have caused an injury. The military's culture of respect for the chain of command and, sometimes

and unfortunately, misinformation, provides additional hurdles as well.

These challenges in obtaining accurate, complete, and relevant information substantiating potential claims implicate the equitable tolling doctrine that is stage center in this case. While the availability of equitable tolling under the FTCA is a matter of debate between the parties here, there is no debate about the benefits that the doctrine confers for those who must submit FTCA claims, including the servicemembers and their families that CLASV represents.

ARGUMENT

A. Servicemembers And Their Families Face Challenges In The Administrative Claims Process When Pursuing Remedies For Substandard Care.

The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b).

The general rule under the FTCA is that a tort claim accrues at the time of the plaintiff's injury. *United States v. Kubrick*, 444 U.S. 111, 120 (1979). However, where a plaintiff would reasonably have had difficulty discerning the fact or cause of injury at the time it was inflicted, the "'diligence-discovery rule of accrual'" applies. *Valdez ex rel. Donely v. United States*, 518 F.3d 173, 177 (2d Cir. 2008) (quoting *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998)); *see also Kubrick*, 444 U.S. at 120 n.7 (noting that a number of Circuits have applied the discovery rule to medical malpractice claims under the FTCA). Under this rule, "'accrual may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause.'" *Valdez*, 518 F.3d at 177 (quoting *Kronisch*, 150 F.3d at 121).

In circumstances involving medical negligence, therefore, once an injury and its cause are discovered, the FTCA's two-year limitations period for presenting an administrative claim begins to run. To initiate the claims process, a claimant must execute a Standard Form (SF) 95 and present a claim for money damages in a sum certain to the responsible federal agency. 28 C.F.R. § 14.2. Unfortunately, servicemembers and their families can encounter profound difficulties in meeting the two-year deadline to submit a claim.

First, there is a lack of awareness among servicemembers' families that the claims process

even exists as a requirement for obtaining a recovery. In CLASV's experience, despite efforts to publicize the claims process, servicemembers' families often do not learn of the process until the two-year limitations period already has begun.

Second, there are inherent challenges to military life that inhibit the claims process, even where the families are aware of the process. Servicemembers' families frequently have only one parent to manage a busy household, leaving little time to tackle the claims process. *See* The White House, Strengthening Our Military Families, Meeting America's Commitment, p. 7 (January 2011) ("More than 700,000 children have experienced one or more parental deployment. Currently, about 220,000 children have a parent deployed."). If the head-of-household is the family member who has sustained the injury, these issues are compounded. An injured parent left to care for the family while a loved one is on active-duty, possibly thousands of miles away, faces considerable time management issues—the burden of the claims process only adds to these issues. *Id.* As a result, in CLASV's experience, claimants frequently do not come forward until much of the statutory period has run.

Third, assuming that the decision is made to tackle the claims process, there are added complications in completing the required form. While the claims process is a fair and equitable one, the form requires specific foundational information

supporting the claim (including possible witnesses) and a representation about the claim's economic value. For personal injury claims, the information needed includes "a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred." The process for acquiring the needed information therefore takes additional time, with the statutory clock continuing to run.

Indeed, with medical claims specifically, the access to relevant information for servicemembers' families (and those who assist them) is daunting. To begin with, medical reports bearing on the existence of a claim are often difficult to come by, even when claimants employ the utmost diligence. According to the DoD's recent review of the MHS, a survey on patient safety culture revealed that "[f]ewer than 30 percent of staff actively reports patient safety events" which "puts DoD within the 10th percentile (underperforming) for patient safety reporting when compared to the . . . national average." Final Report to the Secretary of Defense, Military Health System Review, pp. 7, 179 (August 2014). Media attention has highlighted these systemic reporting problems in the MHS. *See* Sharon LaFraniere and Andrew W. Lehren, *In Military Care, a Pattern of Errors but Not*

Scrutiny, N.Y. Times (June 28, 2014) ("[A] pilot study by the Pentagon last year found that nearly half the patients whose files were reviewed at a major military hospital had been harmed at least once. The study suggested 99 percent of harm at that hospital was not reported by medical workers.").

Some of the reporting problems also emanate from certain characteristics of the military culture. In assisting military personnel and their families, CLASV's members have observed an intense culture of respect for the chain of command within the military, including within the MHS. Reporting incidents of wrongdoing by superiors could be perceived as insubordination; therefore, staff may be hesitant to file reports containing the information necessary for administrative claims. Notably, in reviewing comments obtained from hospital staff at town hall meetings, the DoD found that at least one staff member at multiple facilities "stated that they felt they would be retaliated against for speaking up regarding reporting errors and events." Final Report to the Secretary of Defense, Military Health System Review, pp. 187-88 (August 2014); *see also* Sharon LaFraniere and Andrew W. Lehren, *U.S. Military Hospitals Are Ordered to Improve Care, Access and Safety*, N.Y. Times (Oct. 1, 2014) ("[T]he study released Wednesday found that some military medical workers are afraid to report safety problems for fear of retribution, raising the possibility that

lapses or mistakes in treatment have gone unnoticed.").

Moreover, even where servicemembers' families are able to obtain essential information on their claims and diligently pursue their rights, additional obstacles may prevent them from presenting a timely claim. In particular, servicemembers' families can be subject to misinformation and bureaucratic mishap. When wrongdoing is suspected in the sustaining of an injury at a military hospital, the potential claimant or their families frequently will seek guidance from medical personnel. In such cases, they may receive faulty information on the claims process, make decisions based on that misinformation, and miss out on an opportunity to seek appropriate relief.

A contributing factor to the dissemination of false information is, once again, specific to the military culture. CLASV's members have observed that, far too often, military personnel and their families are told the untruth that "you can't sue the Government." That refrain is echoed even by military personnel within the MHS. Consequently, this culture of misinformation can further delay potential FTCA claimants who are diligently pursuing their rights but already have faced delays in obtaining information essential to their claims.

In short, although the two-year window for submitting an administrative claim under the FTCA

seems adequate in the abstract, a number of factors can combine to make a timely submission impractical or even impossible. To be sure, that is not always the case, but when it is, and there has been no lack of diligence, the doctrine of equitable tolling can have a material and beneficial impact.

B. Equitable Tolling Can Be Critical To Preserving Administrative Claims Under The FTCA.

"Equitable tolling" is "a doctrine that pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014) (internal quotation marks omitted); *see also Valdez*, 518 F.3d at 182 ("Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations 'if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.'" (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990))). Equitable tolling differs from the delayed discovery accrual principle noted above in that "the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Cada*, 920 F.2d at 451.

Although it can be implicated, fraudulent concealment is not essential to equitable tolling. Equitable tolling "'does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing.'" *Valdez*, 518 F.3d at 182 (quoting *Cada*, 920 F.2d at 451); *see also Santos ex rel. Beato v. United States*, 559 F.3d 189, 203 (3d Cir. 2009) ("affirmative misconduct is not required to find that [plaintiff] exercised due diligence sufficient for equitable tolling to apply"). The relevant question for equitable tolling "'is not the intention underlying the defendants' conduct, but rather whether a reasonable plaintiff in the circumstances would have been aware of the existence of a cause of action.'" *Valdez*, 518 F.3d at 183 (quoting *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004)).

The equitable tolling doctrine, at present, is utilized by FTCA claimants and relied on by courts. Thus, courts have applied equitable tolling to preserve claims where, despite all reasonable diligence, potential claimants are unable to obtain information vital to a timely submission of an FTCA administrative claim. Specifically, courts have provided the benefits of equitable tolling where claimants are unable to obtain medical records from military hospitals despite repeated requests.

In *Aziz ex rel. Azizi v. United States*, for example, the district court applied equitable tolling to a claim of negligent pre-natal care at a military

hospital. 338 F. Supp. 2d 1057 (D. Neb. 2004). "Of particular significance" to the court was "the fact that plaintiff ha[d] shown that she attempted to obtain medical records and that records were not provided to her." *Id.* at 1062; *see also Gess v. United States*, 909 F. Supp. 1426, 1441-42 (M.D. Ala. 1995) (relying on equitable tolling to deny summary judgment on a claim for medical malpractice, finding "of great importance the fact that the [Air Force Office of Special Investigations] never informed [the plaintiff] of its finding" on malpractice at the hospital).

Additionally, courts have invoked equitable tolling in cases where claimants were given misinformation about the FTCA claims process. In *Bartus v. United States*, for example, the district court held that the FTCA limitations period was equitably tolled because the claimant acted on misinformation given by a benefits counselor. 930 F. Supp. 679, 682 (D. Mass. 1996). The claimant intended to present an FTCA claim, but, heeding the benefit counselor's instructions, filled out a form for disability benefits. *Id.* at 680. The court acknowledged that there was no evidence that the benefits counselor had engaged in affirmative misconduct, but held that "[a] claimant need not necessarily show affirmative misconduct to avail himself of equitable tolling; rather, he must show that failure to meet a filing deadline was, in a phrase, 'out of his hands.'" *Id.* (quoting *Kelley v.*

N.L.R.B., 79 F.3d 1238, 1248 (1st Cir. 1996)). According to the court, "it would be distinctly unfair to allow this bureaucratic snafu to foreclose plaintiff's claim." *Id.*

These examples are by no means exclusive. Rather, the tolling doctrine is applied in a variety of fact patterns when equity and fairness warrant it. *See, e.g., Glarner v. United States, Dep't of Veterans Admin.*, 30 F.3d 697, 702 (6th Cir. 1994) ("[W]e hold that the statute was equitably tolled from the point at which the VA failed to furnish Glarner with an SF95 and failed to inform him of the need to file one."); *Jackson v. United States*, 488 F. Supp. 2d 191, 196 (N.D.N.Y. 2007) ("[T]his Court finds that the statute was equitably tolled starting at the time when the VA failed to inform Plaintiff of the proper procedure and failed to provide the proper (SF95) form when it sent Plaintiff the . . . request for further information for his benefits claim."); *Casey v. United States*, 161 F. Supp. 2d 86, 95 (D. Conn. 2001) (applying equitable tolling where "no VA employee apprised plaintiff of the procedures he would have to follow to file a tort claim against the [G]overnment, even though plaintiff discussed the possibility of filing a tort action with his counselors").

In sum, as shown by these exemplar cases, when exceptional fact patterns arise, equitable tolling prevents "distinctly unfair" results from befalling servicemembers and their families who

have FTCA claims but are unable to timely pursue them for reasons beyond their control.

C. Equitable Tolling Should Be Preserved For FTCA Claims As A Matter Of Sound Policy.

The FTCA was enacted to provide a fair and just process for preserving the rights of individuals who have meritorious claims against the Government. Indeed, Congress specifically designed the FTCA claims process "to be 'unusually protective' of claimants." *Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (quoting *Heckler v. Day*, 467 U.S. 104, 106 (1984)); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of [G]overnment activities[.]"). The doctrine of equitable tolling furthers this protective purpose. As the cases discussed previously serve to underscore, the doctrine plays a small but vital role in a narrow range of fact patterns to help protect claimants and allow recovery where the FTCA provides for it.

While the Government argues that the FTCA's two-year statute of limitations needs to be applied absolutely, and without recognition of equitable tolling, CLASV strongly opposes the Government's position. There is no express indication in the FTCA's limitations provision that

equitable tolling cannot be applied. The Government adopts that position only by implication and inference from language that does not refer to tolling at all.

Nor is there any perceptible or quantifiable reason that equitable tolling should not be applied. The doctrine aligns with the FTCA's protective goals. And, there is no indication that the application of the doctrine in those cases where it is warranted has led to any wholesale assault on the public fisc. On the contrary, the federal courts have applied the doctrine carefully, and only where the record unequivocally supports it. *See, e.g.*, *Barry v. Mukasey*, 524 F.3d 721, 724-25 (6th Cir. 2008) (refusing to invoke equitable tolling to excuse a lack of diligence); *Ryan v. United States*, 534 F.3d 828, 832 (8th Cir. 2008) (same); *Gonzalez v. United States*, 284 F.3d 281, 291-93 (1st Cir. 2002) (same).

By the same token, however, the equitable tolling doctrine, when applicable, is of material benefit to servicemembers and their families who, despite their best efforts, cannot present a timely claim. The case-by-case application of the doctrine thus should be retained to help servicemembers and their families receive the benefits intended by the claims process, rather than being burdened with the hardships that denial of a meritorious claim portends.

CONCLUSION

For the reasons noted, *amicus* respectfully urges this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1075

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MARLENE JUNE, CONSERVATOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE AND THE SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the National Center for Law and Economic Justice ("NCLEJ") and the Sargent Shriver National Center on Poverty Law ("Shriver Center"). Each *amicus* has decades of experience in securing and maintaining legal protection for the least fortunate members of our society. The *amici* submit this brief in support of Respondent because the position taken by the Government would create a limitations trap in medical malpractice cases against federally funded Community Health Centers ("CHCs") that would adversely affect the low-income families and individuals *amici* serve.

NCLEJ.[2] For nearly half a century, the NCLEJ has litigated in state and federal courts nationwide to protect and promote the economic security of low-income families and individuals and as part of that advocacy has worked to protect access to the courts for these individuals.

Shriver Center.[3] For more than 40 years, the Shriver Center has provided national leadership in efforts to increase justice and opportunity for low-income people and to ensure that their voices are heard in the making of public decisions that affect them. Through policy development, advocacy, litiga-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

[2] http://www.nclej.org.

[3] http://www.povertylaw.org.

tion, consulting, training, and communications, it builds the nationwide capacity of low income communities by representing them directly and by supporting and enhancing the capacity of other public interest lawyers who serve them.

SUMMARY OF THE ARGUMENT

Since 1962, federally funded Community Health Centers have played a vital role in the delivery of health services to poorer Americans. Of the 21 million individuals who visited these CHCs in 2013, 71% were below the poverty line and fully 92% were below 200% of the poverty line.

Valuable and vital as CHCs are, they are not perfect. On occasion, malpractice happens. Prior to 1992, malpractice claims against CHCs and their staff were litigated under state law.

In 1992, however, Congress enacted the Federally Supported Health Centers Assistance Act of 1992 (the "FSCHAA"),[4] which made the Federal Tort Claims Act (the "FTCA") the *exclusive* vehicle for malpractice claims against federally funded Community Health Centers and their associated professionals. In doing so, Congress was not "waiving sovereign immunity" to permit a cause of action that had previously been barred, as in the construction of the FTCA urged by the Government. Rather, Congress was *replacing* an existing cause of action against private parties under state law with a new, exclusive federal cause of action against the United States.

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[4] Pub. L. No. 102-501, 106 Stat. 3268 (as amended and made permanent by the Federally Supported Health Centers Assistance Act of 1995, Pub. L. No. 104-73, 109 Stat. 777, codified principally at 42 U.S.C. § 233(g)).

The FSCHAA was enacted two years after this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), which explicitly recognized that the longstanding presumption in favor of equitable tolling applies to claims against the federal government. Even under the Government's "prospective only" reading of *Irwin*, Congress was creating a new federal claim that would be presumed subject to equitable tolling. Congress was doing so, moreover, against the backdrop of existing state law causes of action that were in many cases themselves subject to tolling doctrines of one form or another.

Nothing in either the text of the FSCHAA or the legislative history suggests that Congress thought the new claims would not be subject to equitable tolling in appropriate cases. Whether one views Congress's failure to bar equitable tolling in the post-*Irwin* adoption of the FSCHAA as legislative acquiescence in *Irwin*, or whether one sees it as simply confirming that the FTCA statute of limitations has *always* been subject to equitable tolling, the result is the same: the FTCA requirement that an administrative claim be filed within two years of the date of accrual is subject to equitable tolling in appropriate circumstances.

ARGUMENT

THE FEDERALLY SUPPORTED HEALTH CENTERS ACT OF 1992 DEMONSTRATES THAT THE LIMITATIONS PROVISIONS OF THE FTCA ARE SUBJECT TO EQUITABLE TOLLING

1. The Health Center System

Six-year-old Mercy Santos had a swollen jaw and a fever when her mother took her to York Health Corporation's pediatric clinic in York, Pennsylvania. After at least seven visits to York's pediatric and dental clinics over the course of a month, Mercy ended up in the emergency room, where she was diagnosed with a deep neck-space infection extending into her spine. After 19 days in the hospital and months in a cervical collar, Mercy's top two vertebrae grew back fully fused together, permanently impairing her movement. She will likely suffer from an accelerated degenerative disc disease in her lower vertebrae.[5]

Mercy's mother hired counsel, who identified a doctor, two dentists, and a physician assistant whose negligence caused Mercy's injuries. Counsel performed a public records search on York Health, corresponded with York Health, obtained Mercy's medical records, visited the clinic, and reviewed records on-site. Two years and five months after the claim accrued, counsel filed a medical practice action in state court. While Pennsylvania typically applies a two-year statute of limitations in medical malprac-

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[5] *Santos ex rel. Beato* v. *United States*, 559 F.3d 189 (3d Cir. 2009).

tice cases, counsel reasonably believed the action to be timely based on a statutory provision that tolls the statute of limitations in civil actions until the would-be plaintiff, a minor, turns 18. *See* 42 Pa. Cons. Stat. § 5533(b)(1)(i)-(ii).

Months later, the United States substituted itself as defendant and removed the case to federal court. Unbeknownst to counsel — and not revealed through his diligent investigation — York Health Corporation (and its employees) had been deemed federal government employees. *See* 42 U.S.C. § 233(g). Mercy's claims were thus governed by the Federal Tort Claims Act — and, most important, its two-year statute of limitations for filing administrative claims. Absent equitable tolling, Mercy could not recover for her injuries.

Mercy's case is not an outlier.[6] Instead, it is an inevitable — but unfortunate and almost certainly unintended — consequence of the system designed by the federal government to fund health providers that deliver medical services to the nation's poor. Pursuant to the Public Health Service Act, the federal government helps fund more than 1,300 public and nonprofit health organizations that serve "medically

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[6] *See, e.g., Sanchez* v. *United States*, 740 F.3d 47 (1st Cir.), *cert. denied*, 135 S. Ct. 54 (2014); *Phillips* v. *Generations Family Health Center*, 723 F.3d 144 (2d Cir. 2013); *Arteaga* v. *United States*, 711 F.3d 828 (7th Cir. 2013); *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135 (2d Cir. 2011); *Valdez ex rel. Donely* v. *United* States, 518 F.3d 173 (2d Cir. 2008); *Swift* v. *United States*, 2014 WL 2769141 (D. Mass. June 17, 2014); *Bazzo* v. *United States*, 2011 WL 2601009 (E.D. Mich. June 30, 2011); *Bohrer* v. *City Hosp., Inc.*, 681 F. Supp. 2d 657 (N.D. W. Va. 2010); *Jones* v. *United States*, 2007 WL 4557211 (M.D. Fla. Dec. 21, 2007).

underserved" rural and urban areas, as well as the homeless, migratory and seasonal agricultural workers, and residents of public housing. *See* 42 U.S.C. § 254b.[7] These federally qualified health centers served 21 million people last year, 71.9 percent of whom were at or below the poverty line.[8]

In order to alleviate the burden of purchasing private medical malpractice insurance and make funds spent on premiums available for additional health services,[9] Congress in 1992 extended to these centers protection from medical malpractice liability. Under 42 U.S.C. § 233(g), federally funded health centers can apply to be deemed federal agents and employees for purposes of the FTCA, making a claim against the federal government the exclusive remedy for malpractice. The provision today shields nearly 1,000 organizations[10] from liability under state law,

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[7] The history of these centers dates back to the 1962 enactment of the Migrant Health Act, which provided medical funding and support for migrant and seasonal agricultural workers. Subsequently, some neighborhood health centers began to receive federal funding under the Economic Opportunity Act of 1964. U.S. Department of Health and Human Services, *Health Centers America's Primary Care Safety Net Reflections on Success, 2002-2007*, 1-2, *available at* ftp://ftp.hrsa.gov/bphc/HRSA_HealthCenterProgramReport.pdf. Responsibility for funding these centers was later transferred to the Department of Health, Education, and Welfare, and, in 1975, Congress amended the Public Health Service Act to create a more formal system for funding them. *See* Pub. L. No. 94-63, § 501. *See also* S. Rep. No. 94-29, at 38-39 (1975).

[8] National Program Grantee Data, http://www.bphc.hrsa.gov/uds/datacenter.aspx?year=2013 (last visited Nov. 10, 2014; data are for 1,201 reporting grantees).

[9] *See* H. R. Rep. No. 102-823 (Part 1), at 3-5 (1992).

[10] Based on search of deemed health centers on the Health Resources and Services Administration's website. *See* http://

Footnote continued on next page.

including groups such as Jewish Renaissance Medical Center of Perth Amboy, N.J., Presbyterian Medical Services of Santa Fe, N.M., and Valley Health Team, Inc., of San Joaquin, Calif.

2. The Statute of Limitations Trap

With names like these, it is not surprising that even experienced medical malpractice lawyers who engage in extensive investigation of their clients' claims fail to discover that those claims are governed by the FTCA. Indeed, courts have recognized that plaintiffs and their counsel may have no reason even to ask the question. In the case of Mercy Santos, the Third Circuit reversed the district court's refusal to apply equitable tolling for precisely this reason. Even if publicly available sources could have shown that York was covered by the FTCA, the court held, the government had not shown "what circumstances should have led her to inquire into York Health's federal status for purposes of FTCA." *Santos ex rel. Beato* v. *United States*, 559 F.3d 189, 203 (3rd Cir. 2009). Nor did statements on York's website that it was a federally qualified health center and that it received federal funding reveal "to a reasonably diligent plaintiff" that its doctors would be covered by the FTCA. *Id.* at 201.

The Second Circuit has likewise recognized that equitable tolling may be appropriate where counsel, despite investigating diligently, fails to discover a health provider's FTCA status. In *Phillips* v. *Generations Family Health Center*, 723 F.3d 144 (2d Cir. 2013), plaintiff's counsel tried to determine Genera-

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www/bphc.hrsa.gov/ftca/healthcenters/ftcahcdeemedentitysearch.html (last visited Nov. 10, 2014).

tions' ownership and funding structure by visiting its website, looking at medical records, and having a paralegal perform a corporate search. *Id.* at 146. The court remanded because the district court had applied an erroneous *per se* rule that lawyers at top malpractice firms always lack diligence if they fail to investigate an apparently private health center's federal status. *Id.* at 148-49. Instead, it held, a case-by-case consideration of all relevant facts is required.[11] Again, the availability of a health center's FTCA status was not dispositive. "Although HHS has created a publicly accessible online database of all its deemed employees and established a toll-free phone hotline that prospective plaintiffs can call to determine if a particular provider is a federal employee, Nielsen was apparently unaware of these resources and, in any event, did not suspect that Generations might be a federal employee." *Id.* at 147.

The trap in *Santos* and *Phillips* is not an anomaly. *See Valdez ex rel. Donely* v. *United* States, 518 F.3d 173, 183 (2d Cir. 2008). It follows from the absence of national uniformity with regard to statutes of limitations. Under the FTCA (and absent tolling), a claim expires two years after the plaintiff knows "both the existence and the cause of his injury." *United States* v. *Kubrick*, 444 U.S. 111, 113 (1979). State causes of action, though, may accrue at different times,[12] expire after a greater number of years,[13]

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[11] The court noted that "[t]he government could probably avoid such a case-by-case inquiry by requiring . . . that all deemed employees provide notice to patients about their federal status." 723 F.3d at 153.

[12] New York and Michigan, for instance, both use a form of the continuous treatment rule. N.Y. C.P.L.R. § 214-a; Mich. Comp. Laws Ann. §§ 600.5805, 600.5838.

or be subject, as in *Santos*, to bright-line rules of statutory tolling.

This patchwork of state medical malpractice laws becomes problematic when plaintiffs have no reason to suspect that generous state limitations or accrual rules might not apply. And although differing statutes of limitation alone may not justify equitable tolling, courts have recognized that diligent counsel's failure to discover that plaintiffs' claims are covered by the FTCA may be the kind of "extraordinary circumstances" that merit relief. This is so even apart from any affirmative misconduct on the part of these health centers. *See Valdez ex rel. Donely*, 518 F.3d at 184 (remanding because of "a special circumstance that may warrant equitable tolling even absent fraudulent concealment").

3. The Case for Equitable Tolling

Now, take the complex legal landscape described to this point — a landscape that seasoned legal practitioners have trouble navigating — and consider the difficulty the typical health center client might face in attempting to assert a legal claim. The 21 million people who visited these centers last year are among the country's most impoverished. In fact, more than 92 percent of patients were at or below 200% of the poverty line (compared to 34.2% of the U.S. population), and more than 71 percent were at or below 100% of the poverty line (compared to 15.0% of the U.S. population).[14] Low-income individuals may not

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[13] In Maryland, for example, actions must be brought within the earlier of five years of the time of injury or three years of discovery of the injury. Md. Code, Cts. & Jud. Proc. § 5-109.

[14] As set forth in HRSA's National Program Grantee Data, *su-*

Footnote continued on next page.

realize that they have a legal claim or that legal help is available and thus may not seek legal assistance — or seek it late. Legal Services Corporation, *Documenting the Justice Gap in America* (2009). They are also significantly less likely to bring a medical malpractice suit. Mark A. Rothstein, *Health Care Reform and Medical Malpractice Claims*, 38 J. Law, Medicine & Ethics 871-74 (2010). These clients, who already face significant obstacles in accessing legal services, can hardly be expected to avoid the statute of limitations trap that ensnares so many experienced lawyers.

In taking away existing state-law remedies for medical malpractice by CHCs and substituting for them claims against the United States under the FTCA, Congress could not have intended to create limitations traps for the very individuals CHCs were created to serve. The FSHCAA was enacted against the backdrop of presumed equitable tolling that was expressly recognized by this Court in *Irwin*. *Irwin* pre-dated the FSCHAA by two years; even under the Government's "prospective only" reading of *Irwin*, malpractice claims involving CHCs are clearly new causes of action against the United States that were created after *Irwin* was handed down.

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pra, the centers served 1.1 million homeless people, 861,000 agricultural workers, and 227,000 people who live in public housing in 2013. In addition 22.9% of health center patients were best served in a language other than English. Health centers also treat significant numbers of people with mental health problems or disabilities: 1.1 million patients received mental health services, 105,000 received substance abuse services, and 2 million received enabling services.

The legislative history of the FSCHAA reflects Congressional awareness that malpractice claimants against CHCs would no longer have jury trials or punitive damages available.[15] It likewise reflects that Congress knew that malpractice claims involving a CHC would now be subject to a uniform federal statute of limitations.[16] Nowhere in either the legislative history or the text of the FSCHAA, however, is there the slightest suggestion that Congress intended to preclude relief from the FTCA limitations periods for individuals who, through no fault of their own, did not timely perceive that their only claim was against the United States.

The rule advocated by the Government turns the presumption against which Congress legislated on its head. It does so at the expense of our nation's most vulnerable individuals. Whether one views the enactment of the FSCHAA in 1992 and its re-enactment in 1995 as legislative acquiescence in *Irwin* in the context of the FTCA, or whether one sees them simply as confirmation that the FTCA limitations periods have *always* been subject to equitable tolling, the result is the same: the limitations periods of the FTCA are subject to equitable tolling in appropriate cases.

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[15] *See* H. R. Rep. No. 102-823 (Part 2), at 4 (1992).

[16] *Id.* at 6.

CONCLUSION

The judgment below should be affirmed.

November 11, 2014

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1075

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MARLENE JUNE, CONSERVATOR

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* PARALYZED VETERANS OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, JEWISH WAR VETERANS OF THE UNITED STATES, INC., NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL DEFENSE COMMITTEE, NATIONAL COALITION FOR HOMELESS VETERANS IN SUPPORT OF RESPONDENT

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are all service and advocacy organizations whose missions are to assist and further the interests of the over 25 million living veterans and active service members of the United States armed forces. They all share a strong interest in ensuring that these veterans and service members receive the benefits to which they are entitled by virtue of their service and sacrifice to the Nation. Moreover, they share an interest in ensuring that the Government is held accountable when it fails to provide these benefits or causes injury to veterans, whether in the provision of these benefits or through other misconduct.

Paralyzed Veterans of America ("PVA"), a congressionally chartered veterans service organization founded in 1946, has developed a unique expertise on a wide variety of issues involving the special needs of veterans of the armed forces who have experienced spinal cord injury or dysfunction. PVA uses that expertise to be the leading advocate for quality health care for veterans, research and education addressing spinal cord injury and dysfunction, benefits available as a result of its members' military service, and civil rights and opportunities that maximize the independence of its members.

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[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. All parties have been timely notified of the undersigned's intent to file this brief; both petitioner and respondent have consented to the filing of this brief.

The Military Order of the Purple Heart ("MOPH"), chartered by Congress in 1958, is a non-profit organization comprised of military men and women who received the Purple Heart for wounds received in combat. It is the only veterans' service organization comprised exclusively of combat veterans. Through its National Service Program, MOPH operates a nationwide network of 77 service offices that have assisted over 91,000 veterans and their families obtain well-deserved benefits. MOPH provides service to veterans through volunteers at over 100 Veterans Health Administration Medical Centers and clinics across the country. MOPH also promotes Americanism through its myriad educational and scholarship programs.

The Jewish War Veterans of the United States, Inc. ("JWV"), organized in 1896 by Jewish Veterans of the Civil War, is the oldest active national veterans' service association in America. JWV is a federally chartered patriotic organization that has among its purposes a continuing commitment to maintain true allegiance to the United States of America; to foster and perpetuate trust in Americanism; to uphold the fair name of Jews and fight their battles wherever unjustly assailed; to encourage the doctrine of universal liberty, equal rights, and full justice to all men and women; to combat the powers of bigotry and darkness wherever originating and whatever the target; and to preserve the memories and records of patriotic service performed by the men and women of the Jewish faith and honor their memory. In furtherance of its organizational purposes, JWV engages in extensive advocacy in support of veterans.

The National Veterans Legal Services Program ("NVLSP") is a federally chartered, nonprofit organization that has worked since 1980 to ensure that the Government delivers to our Nation's 25 million veterans and active duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country. NVLSP provides pro bono legal assistance (through its own lawyers as well as a network of outside volunteer counsel) to veterans with disability issues in connection with claims for benefits to which they are entitled.

The National Defense Committee is a War Veterans organization that focuses on matters that impact upon the individual civil rights of military personnel and veterans and benefits programs for individual military personnel and veterans, as they relate to veterans' care, national defense, homeland security, and national security.

The National Coalition for Homeless Veterans ("NCHV") is a nonprofit organization that serves as the resource and technical assistance center for a national network of community-based service providers and local, state and federal agencies that provide emergency and supportive housing, food, health services, job training and placement assistance, legal aid and case management support for hundreds of thousands of homeless veterans each year. NCHV also serves as the primary liaison between the Nation's care providers, Congress, and the Executive Branch agencies charged with helping them succeed in their work. NCHV's advocacy has strengthened and increased funding for virtually every federal

homeless veteran assistance program in existence today.

Amici assert that the position presented by the Government in this case – as well as in *United States v. Wong*, No. 13-1074 – would have a profoundly prejudicial impact on America's veterans and is contrary to the longstanding national policy that veterans are to be provided every benefit of the doubt and assistance in their interactions with the Government.

SUMMARY OF ARGUMENT

I. Congress has a long and ever-expanding record of supporting policies that promote the fair and equitable – even preferential – treatment of this Nation's veterans with respect to their interactions with the federal government. This solicitude is especially pronounced in connection with veterans' efforts to assert claims for benefits and compensation from the Department of Veterans Affairs ("VA"). Indeed, Congress has long imposed on the VA a "duty to assist" veterans in obtaining such benefits and compensation. Moreover, in creating the process by which veterans obtain benefits and compensation from the federal government, Congress has been adamant that the Government "should not create technicalities and bureaucratic hoops for them to jump through." 146 Cong. Rec. S9212-13 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller).

II. One of the ways in which Congress's solicitude toward veterans has manifest itself is through a complex system of benefits that, while valuable, also renders veterans far more susceptible to governmental negligence than average citizens. Most notably,

millions of veterans receive their health care through the Veterans Health Administration ("VHA"). Each year, veterans submit thousands of claims for medical malpractice against the VHA.

The complexity of the VA system, combined with the VA's statutory notice and assistance obligations, has created a confusing process that often results in veterans unwittingly failing to submit Federal Tort Claims Act ("FTCA") claims properly. Victims of medical malpractice by the VHA have two avenues of recourse: the FTCA and an administrative claim under 38 U.S.C. § 1151. Section 1151 compensation is awarded exclusively through a VA administrative process and provides limited compensation on a monthly basis that "dies with the veteran." The FTCA, on the other hand, provides a lump-sum payment that takes into account, for example, pain and suffering and lost wages, and is also transferrable to a veteran's spouse or family members upon the veteran's death. Because of this dual-track process, the VA – who possesses a "duty to assist" veterans with benefits claims and upon whom veterans rely for such assistance – frequently instructs claimants about the Section 1151 claims process, but not the separate FTCA claims process. Consequently, veterans who believe they are diligently pursuing the administrative process to assert all of their malpractice claims against the VA are often surprised to find they are pursuing only the limited Section 1151 claim and not the more valuable FTCA claim. Courts have applied equitable tolling in such cases to alleviate the resulting injustice, but a ruling in favor of the Government here would remove this vital check on this administrative legerdemain.

III. Equitable tolling is particularly merited with respect to claims brought by veterans for other reasons as well. Recent scandals at the VA have uncovered a "systemic, totally unacceptable lack of integrity within" the VHA. Remarks by Secretary Eric K. Shinseki, U.S. Dep't of Veterans Affairs, *2014 National Coalition for Homeless Veterans Annual Meeting* (Washington D.C. May 30, 2014), *available at http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014). Specifically, investigations have revealed widespread efforts to conceal and misrepresent failures in care provided to veterans at VHA health facilities, including falsifying records regarding patient waiting times and covering-up patients' exposure to Legionnaires' disease. Such actions to conceal evidence undercuts the ability of a veteran to exercise legal recourse against the Government and to attain a remedy allowed under the law.

In addition to these recent scandals, certain characteristics of the veterans community makes it particularly in need of equitable treatment. Millions of veterans suffer from some sort of mental health disorder or cognitive impairment as a result of their service. Such conditions often render veterans unable to follow procedural formalities scrupulously. Additionally, veterans comprise a disproportionate percentage of America's homeless population relative to their representation in the general populace. The lack of a mailing address alone means that these veterans have no reliable means of receiving notice under the FTCA regarding their claims. Moreover, the lives of the homeless are defined by extraordinary circumstances on a daily basis. The withdrawal of equitable treatment under these circumstances

would be particularly antithetical to Congress's policy toward veterans.

IV. Finally, a holding that upholds the application of equitable tolling to FTCA claims is consistent with this Court's application of the "discovery rule" in determining the accrual of medical malpractice claims under the FTCA. In *United States v. Kubrick*, 444 U.S. 111, 113 (1979), in connection with a medical malpractice claim brought by a veteran under the FTCA, the Court rejected the general rule of accrual and instead adopted the more equitable "discovery rule," which provides that the statute of limitations begins to run only when the plaintiff knows of *both* the existence of his injury and its cause. The "discovery rule" is a common-law doctrine of equity that this Court found was consistent with the Government's waiver of sovereign immunity under the FTCA. The application of equitable tolling would not extend the United States' waiver of sovereign immunity any more than the application of the common-law "discovery rule."

Furthermore, a holding that prohibits the application of equitable tolling would force lower courts to make arbitrary distinctions between, for example, whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury, or did expire because the existence of the claim was fraudulently concealed after the fact. The survival of veterans' medical malpractice claims should not hang on such an illusory distinction.

ARGUMENT

I. Congress Has a Long and Ever-Expanding Record of Supporting Fair and Equitable Treatment for Veterans by the Federal Government.

"The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). This statement by the Court, in the context of the ever-increasing scale of pensions, homes, hospitals and other facilities provided for veterans, represents the lens through which the Court should interpret Congress's general intent that veterans receive fair and equitable treatment, and even preferential treatment where reasonable, from the federal government.

One of the earliest known examples of the codification of our cultural belief that veterans should be afforded generous treatment in exchange for their service dates to 1636, when the Plymouth Colony passed a law to support disabled soldiers from conflicts with the Pequot Indians. *See History – Department of Veterans Affairs (VA), U.S. Dep't of Veterans Affairs, available at http://www.va.gov/about_va/vahistory.asp (last visited Nov. 7, 2014).* Examples of the same principle continued through the Revolutionary War and beyond, including supporting soldiers from both sides of the Civil War, and every other major conflict involving United States service men and women since. *Id.*

As the number of veterans increased in the 20th Century, Congress adapted to increase not only the amount and scope of benefits for veterans, but also included improving and expanding the process for

veterans to receive benefits under notions of equity. For example, in 1956, the United States created the Commission on Veterans' Pensions (commonly known as the Bradley Commission) with the goal of analyzing the way veterans receive benefits and to provide guidance and a framework for providing federal benefits to veterans going forward. The Bradley Commission established certain principles, including:

- "The Government should do everything within its power to distribute the burdens of war service as equitably as possible" and that "[t]imely and adequate assistance must be provided to alleviate the war-incurred handicaps of servicemen"; and
- "Fair and equal treatment of all veterans, disabled and nondisabled, according to their service-connected needs, should be the guiding principle in all our programs."

President's Commission on Veterans' Pensions, *Veterans' Benefits in the United States, Findings and Recommendations*, at 10-12 (Apr. 1956).

The guiding principles set forth by the Bradley Commission can be readily traced forward to subsequent statutory regimes enacted in the second half of the 20th Century. For example, in 1972, Congress added a new clause to the Veteran's Compensation and Relief Act to allow the Secretary of Veterans Affairs to provide for equitable relief in situations where the letter of the law otherwise would not. *See* 38 U.S.C. § 503. In this Act, Congress codified the concept that a veteran should not be barred from applicable benefits due to administrative error, delay,

or any other cause beyond the actual nature of the claim.

In another context, Congress reaffirmed and clarified that support and assistance should be provided to veterans to ensure their claims are properly heard. In the Veterans Claims Assistance Act of 2000, Congress re-codified the long-recognized "duty to assist claimants" in making claims to the VA. *See* 38 U.S.C. § 5103A. This duty, in addition to underscoring the non-adversarial relationship between veterans and the VA, requires the VA to assist veterans in obtaining evidence required to properly adjudicate veteran claims submitted to the VA.

In its debates prior to passing the Act, Congress voiced particular displeasure with certain narrow judicial constructions that it felt necessitated passage of the legislation. During the House's deliberations on the bill, Representative Evans stated, "[v]eterans ... have earned, as a result of their service to our country, [the right] to have their claims [to the VA] decided fairly and fully." 146 Cong. Rec. H6786 (daily ed. July 25, 2000) (statement of Rep. Evans). In the Senate, Senator Rockefeller echoed this sentiment:

> The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate. . . . It is critical that we honor our commitment to veterans and their families. ***We should not create technicalities and bureaucratic hoops for them to jump through***.

146 Cong. Rec. S9211 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller) (emphasis added).

In addition to direct legal obligations to veterans, equitable treatment of our service members and veterans is necessary to secure our significant and immediate military and national security needs. In order to maintain the vitality of our all-volunteer military force, it is necessary for the Government to keep faith with servicemen and veterans concerning their treatment and care. Administrative failings measureable in the loss of lives and health of our servicemen or veterans such as the events at Walter Reed, uncovered in 2007, and the conduct of the Phoenix Veteran Health Administration system, uncovered just this year, undermine this national policy.

In the aftermath of the Walter Reed Scandal, the then-ranking member of the House Committee on Veterans Affairs noted, "[w]e are involved in a long war against terrorism. For this, the Nation's mothers, fathers and spouses trust their sons and daughters and spouses to the Nation's armed forces. They must be confident that they will be cared for should harm come their way." *Findings Of The President's Commission On Care For America's Returning Wounded Warriors*, H. Comm. on Veteran's Affairs, 110th Cong. (Sept. 19, 2007) (statement of Rep. Steve Buyer, Ranking Member, H. Comm. on Veteran's Affairs), *available at https://veterans.house.gov/hearing-transcript/findings-of-the-presidents-commission-on-care-for-americas-returning-wounded* (last visited Nov. 7, 2014). These remarks make clear that the federal government's duties to care for veterans, whether express or implied, are different from and greater than duties arising from other governmental activities. Harms to veterans that are not redressed negatively impact individual veterans and,

in the aggregate, can potentially undermine the viability of military recruitment and retention, which are vital components to the preservation of our national security.

Given the necessary relationship between effective care of veterans and the ongoing efficacy of our active military, it is clear why Congress loudly objects when events threaten the integrity of the Nation's express and implied promises to effectively care for veterans. For example, following the recent scandal related to the Phoenix Veteran Health Administration system, the ranking member of the House Committee on Veteran's Affairs stated, "[m]y heart goes out to the families of the veterans who did not receive the health care they deserved in Phoenix and around the country. Rest assured, we will understand what went wrong, fix it, and hold those responsible for these failures accountable." *Scheduling Manipulation and Veteran Deaths in Phoenix: Examination of the OIG's Final Report*, H. Comm. on Veteran's Affairs, 113th Cong. (Sept. 17, 2014) (statement of Rep. Michael Michaud, Ranking Member, H. Comm. on Veteran's Affairs), *available at http://veterans.house.gov/opening-statement / honorable-michael-michaud (last visited Nov. 7, 2014).*

Consistent with these statements, this Court has recognized, in a variety of contexts, Congress's intent that laws that benefit veterans should be equitably interpreted in favor of them. For example, in 1943, the Court construed a veterans' benefits statute "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Court's decision in *Fishgold v. Sullivan Drydock &*

Repair Corp., decided the same year the FTCA was enacted, also echoed this sentiment by construing a statute in favor of veterans to benefit "those who left private life to serve their country in its hour of great need." 328 U.S. 275, 285 (1946). A further example of the same principle is provided in *King v. St. Vincent's Hosp.*, where the Court embraced "the canon [of statutory construction] that provisions for benefits to members of the [a]rmed [s]ervices are to be construed in the beneficiaries' favor." 502 U.S. 215, n.9 (1991). In each of these rulings, the Court embraced the idea that laws that provide relief for veterans should be interpreted in a manner so as to best provide veterans with the care they need.

These examples throughout the Nation's history provide both a reflection of Congress's intent of solicitude toward veterans and a policy framework within which any legal matter impacting the rights or benefits of veterans in connection with their pursuit of claims against the Government should be equitably interpreted in favor of veterans' interests.

II. Due To Circumstances Unique To The Relationship Between Veterans And The VA System, Elimination Of Equitable Tolling For FTCA Claims Would Contravene Congress's Policy Goals.

Consistent with this longstanding policy favoring America's veterans, Congress has created a system of support and assistance to veterans in recognition of their service to the Nation.[2] These programs were

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[2] *See, e.g., Federal Benefits for Veterans, Dependents and Survivors* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at*

intended to guide veterans through a "non-adversarial system of awarding benefits to veterans," often giving veterans the benefit of any reasonable doubt. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (noting Congress both recognized and wished to preserve the non-adversarial nature of awarding benefits to veterans).

The VA identifies "provid[ing] ... high quality medical care and benefits" as its most important mission. *VA Access Audit & Wait Times Fact Sheet, U.S. Dep't of Veterans Affairs (June 9, 2014), available at http://www.va.gov/health/docs/ vaaccessauditsystemwidefactsheet060914.pdf (last visited Nov. 7, 2014).* This mission is implemented through the Veterans Health Administration ("VHA"), which is the largest integrated health care system in the United States, with over 1,700 healthcare sites serving 8.76 million veterans each year. *See Veterans Health Administration* (2014 Edition), U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/health* (last visited Nov. 7, 2014). Although the VHA system provides many valuable benefits, it is also is liable for many injuries to veterans and their families. Between January 2003 and the middle of 2013, the VA paid approximately $845 million in judgments and settlements to resolve 4,426 of more than 16,000 medical malpractice claims brought by veterans and their families. J. Sweigart and A. Diamant, *VA's Malpractice Tab: $845M in 10*

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http://www.va.gov/opa/publications/benefits_book/2014_Federal_Benefits_for_Veterans_English.pdf (*"Federal Benefits for Veterans, Dependents and Survivors"*) (last visited Nov. 7, 2014).

Years, Cox Media Group, Nov. 12, 2013, *available at http://www.daytondailynews.com/news/news/vas-malpractice-tab-845m-in-10-years/nbpj4* (last visited Nov. 7, 2014). As these figures attest, medical malpractice claims against the VA represent a significant category of tort claims brought by veterans.

In cases of medical malpractice by the VA, veterans or their survivors may choose to pursue both a negligence claim under the FTCA as well as a disability compensation claim under 38 U.S.C. § 1151 ("Section 1151"), but the two claims are very different both in terms of the compensation they afford and the procedural requirements they impose.

Section 1151 provides veterans subject to VA negligence with monthly compensation benefits that often does not provide complete relief. *See Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability). Under Section 1151, the VA makes monthly payments to an injured veteran based on the veteran's rate schedule disability-classification, and other predefined factors. *See* 38 U.S.C. § 1151(a)(1) (establishing the conditions under which a veteran can recover for VA-caused disabilities).[3] Because Section 1151 payments "die with the veteran," the veteran's survivors receive no con-

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[3] *See also Federal Benefits for Veterans, Dependents and Survivors*, at 35 (listing monthly payment amounts, based on percent of disability).

tinuing benefit.[4] Furthermore, Section 1151 claims only compensate for the additional disability caused by the medical negligence. *See* 38 U.S.C. § 1311; 38 C.F.R. § 3.361(b). Accordingly, when a veteran is already significantly disabled, the added disability may result in limited additional compensation.

In contrast, the VA pays a lump sum under the FTCA, taking into consideration the veteran's individual pain, suffering, and economic loss.[5] Unlike the monthly benefits afforded under Section 1151, FTCA awards pass to survivors by will or intestacy. Because FTCA awards are individualized and devisable, veterans who recover under the FTCA, rather than or in conjunction with Section 1151, are better able to care for themselves and their families.

Because both Section 1151 and the FTCA compensate for VHA medical malpractice and involve VA administrative processes, veterans and the VA often

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[4] Under a claim for Dependency and Indemnity Compensation, however, a surviving spouse can seek relief if the VA medical malpractice causes the veteran's death. 38 U.S.C. § 1151(a)(1). Even then, a surviving spouse is eligible to receive only a small monthly sum (approximately $1,233.23 per month for most surviving spouses in 2014). 38 U.S.C. § 1311; *Federal Benefits for Veterans, Dependents and Survivors*, at 116.

[5] *See, e.g., Davis v. United States*, 375 F.3d 590, 591 (7th Cir. 2004) (affirming an award for economic loss and pain and suffering for a veteran's claim against the North Chicago VA hospital that performed the wrong medical procedure and had failed to inform the veteran that medication, instead of invasive surgery, could also treat his condition); *Deasy v. United States*, 99 F.3d 354, 360 (10th Cir. 1996) (upholding an award for pain and suffering relating to the VA's negligent psychiatric treatment).

confuse the two claims. *See, e.g., Bartus v. United States*, 930 F. Supp. 679, 682-83 (D. Mass. 1996) (noting that neither the VA nor the veteran understood the difference between Section 1151 and FTCA claims). Although veterans have the burden of providing the essential information necessary to make their claims, the VA has an affirmative duty to assist veterans in substantiating their claims. *See* 38 U.S.C. § 5103A. Although Section 1151 disability claims and FTCA negligence claims appear similar, veterans must initiate them in different ways. *See Glarner v. United States*, 30 F.3d 697, 700 (6th Cir. 1994) (noting that filing a FTCA claim involves filling out a SF-95 form, separate from the § 1151 claim for disability benefits). When veterans do not understand the different filing requirements (frequently due to the VA's erroneous guidance or negligence), they sometimes fail to file FTCA claims within the limitations period. *See, e.g., Bartus*, 930 F. Supp. at 682-83.

Given the VA's statutory notice and assistance obligations, veterans should not be penalized for mistakes or misdirection by the VA when veterans submit a claim only for the limited Section 1151 remedies, but not a claim under the FTCA, even though they believe they are pursuing both. Justice requires equitable tolling when veterans reasonably rely on the VA's guidance and, as a result, fail to file an administrative FTCA claim within the limitations period. When veterans approach the VA to file a negligence claim, the VA has a duty to provide the appro-

priate form for filing.[6] But because even the VA finds the distinction between § 1151 disability claims and FTCA negligence claims confusing, the VA does not always discharge its duty. When VA institutional incompetence (or worse) causes veterans to file more limited Section 1151 disability claims, but not FTCA negligence claims, courts rely on equitable tolling to remedy the resulting unfairness.

For example, in *Bartus*, the veteran-plaintiff experienced permanent asthma problems after a VA surgery. 930 F. Supp. at 680. The veteran approached a VA benefits counselor to discuss filing a negligence claim and the benefits counselor offered to file the claim on his behalf, consistent with the VA's duty to assist veterans. *Id.* The veteran, however, did not realize that the benefits counselor incorrectly filed the Section 1151 form instead of the FTCA form until almost two years later when the VA denied the veteran's "disability benefits" claim. *Id.* By then, the statute of limitations had run on his FTCA claim. *Id.* The court noted that, "[a]pparently, neither [the veteran] nor the benefits counselor understood the difference between a negligence claim for damages and a negligence claim for disability benefits; the

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[6] *See* 38 C.F.R. § 14.604(a) ("Each person who inquires as to the procedure for filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment, will be furnished a copy of SF 95, Claim for Damage, Injury, or Death."); 38 C.F.R. § 3.150(a) ("Upon request made in person or in writing by any person applying for benefits under the laws administered by the Department of Veterans Affairs, the appropriate application form will be furnished.").

counselor asked [the veteran] to complete a § 1151 form, the wrong form." *Id.* at 682. Because "[i]t would be distinctly unfair to allow this bureaucratic snafu to foreclose plaintiff's [FTCA] claim[,]" the court equitably tolled the statute of limitations for the veteran's FTCA claim. *Id* at 682-83. [7]

Without equitable tolling, the VA has limited incentives to educate its employees on the availability of FTCA claims and the differences between an FTCA claim and a Section 1151 claim. The VA has a duty to serve and care for veterans. When the VA provides negligent medical care, it should not be incentivized to compound the harm by further providing wrong or misleading advice, thus escaping liability for pain and harm it inflicted upon the veteran in the first place. The more extensive remedies available under the FTCA are therefore required to protect veterans and their families from the "systemic, totally unacceptable lack of integrity within" the VHA. *Remarks by Secretary Eric K. Shinseki*, U.S. Dep't of Veterans Affairs, (May 30, 2014), at *http://www.va.gov/opa/speeches/2014/05_30_2014.asp* (last visited Nov. 7, 2014).

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[7] *See also Glarner*, 30 F.3d at 699 (equitably tolling FTCA statute of limitations where veteran-plaintiff told office of Disabled American Veterans in a VA Medical Center that he wanted to file a negligence claim and the officer breached his duty by filing a § 1151 form, rather than an FTCA Standard Form 95).

III. Equitable Tolling Is Particularly Justified With Respect To FTCA Claims Brought By Veterans And Its Elimination Would Have A Devastating Impact.

The equitable tolling doctrine is crucial to veterans and their families due to improprieties surrounding the health care system administered by the VA and the prevalence of mental health issues in the veteran population. These threats are not merely hypothetical. Recent investigations have revealed that the VA has allegedly concealed and falsified records to prevent the disclosure of failures in care. Veterans have a legal right to seek recourse for injuries they sustain while under the VA's care and active concealment of evidence wrongfully prevents that right from being exercised. Additionally, veterans disproportionately suffer from cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. Without equitable tolling, these factors would result in substantial injustices against veterans.

A. Recent VA Scandals Demonstrate Systematic Efforts To Conceal Tortious Conduct Towards Veterans That May Go Unchecked Absent Tolling.

The VA system is currently under intense scrutiny due to recent discoveries that VA personnel have "systemically covered up delays and deaths they have caused" to protect the bonuses of VA managers. *See, e.g.*, *Friendly Fire: Death, Delay & Dismay at the VA*, Senate Oversight Report of the U.S. Dep't of Veterans Affairs, Sen. Tom Coburn, at 4, June 24, 2014, *available at http://www.coburn.senate.gov*

/public/index.cfm?a=Files.Serve&File_id=577d9e90-ee2a-4eee-a52d-2cf394420761 ("Senate Oversight Report") (last visited Nov. 7, 2014). The extent of the alleged malfeasance is appalling and wide-ranging. Over the past decade, it is estimated that "more than 1,000 veterans may have died as a result of VA malfeasance." *Id.*

In Phoenix, for example, a whistleblower recently revealed that over the past few years, more than 1,400 veterans in need of health care were placed on a "secret list" and that documents were shredded to conceal long wait times from the public – and veterans in particular. *Phoenix VA Officials Put on Leave After Denial of Secret Wait List*, CNN, May 1, 2014, *available at http://www.cnn.com/2014/05/01/health/veterans-dying-health-care-delays/index.html* (last visited Nov. 7, 2014). The August 26, 2014 VA Office of Inspector General report, *Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practice as the Phoenix VA Health Care System* (the "Inspector General Report"), found that over 3,500 veterans, many of whom were included on "unofficial wait lists," were waiting to be scheduled for appointments, but were not included on the Phoenix VA official wait list. *See* Inspector General Report at 34. The Inspector General Report also documented "scheduling schemes" used by the Phoenix VA to meet wait time goals imposed by leadership. *Id.* at 49-53. Whistleblowers at VA hospitals in Texas, Wyoming, and New Mexico, among other VA facilities, have admitted to similar concealment practices taking place over the past several years. *See, e.g., Texas VA Run Like a 'Crime Syndicate,' Whistleblower Says*, The Daily Beast, May 27, 2014, *available at*

http://www.thedailybeast.com/articles/2014/05/27/exclusive-texas-va-run-like-a-crime-syndicate-whistleblower-says.html (last visited Nov. 7, 2014). The Inspector General Report confirmed that "[i]nappropriate scheduling practices are a systemic problem nationwide." Inspector General Report, at 65.

Recent VA cover-ups have not been limited to hospital wait times. In Pittsburgh, Pennsylvania, for example, six veterans died and 22 others became ill following an outbreak of Legionnaires' disease. *See* Senate Oversight Report at 30. VA officials allegedly knew of the outbreak for more than a year, yet failed to notify patients or take other precautions to stop the disease from spreading. *VA Hospital Knew Human Error Caused Legionnaires' Outbreak*, CBS News, March 13, 2014, *available at http://www.cbsnews.com/news/va-hospital-knew-human-error-caused-legionnaires-outbreak* (last visited Nov. 7, 2014).

These examples are just a few of the recent scandals that are currently known, though there may be countless other cover-ups being carried out by the VA that may not be revealed until farther in the future. If VA employees are able to conceal or falsify evidence for more than two years, veterans and their families could be left without a remedy under the FTCA in the absence of equitable tolling.

While congressional efforts to hold those responsible for the failures within the VHA system accountable are laudable, it should not be undercut by strained interpretations of existing laws and rules that can provide appropriate redress to veterans.

B. The Disproportionate Impact Of Cognitive Impairments On Veterans Render The Veteran Community Particularly Vulnerable To Abuse Of Process.

Veterans disproportionately suffer health complications involving cognitive impairments that may cause difficulty in understanding and meeting statutory filing deadlines. For example, nearly 700,000 veterans are compensated for post-traumatic stress disorder ("PTSD") alone. *VA Benefits & Health Care Utilization*, U.S. Dep't of Veterans Affairs, *available at http://www.va.gov/vetdata/docs/pocketcards/fy2014q4.pdf* (last updated July 11, 2014). In addition, more than 300,000 veterans and active military personnel have been diagnosed with traumatic brain injury ("TBI") since 2002. *See DoD Worldwide Numbers for TBI*, Defense and Veterans Brain Injury Center, *available at http://dvbic.dcoe.mil/dod-worldwide-numbers-tbi* (last visited Nov. 7, 2014). Veterans inflicted with these conditions frequently suffer from memory loss, confusion, concentration problems, and dementia.

As a result of these mental conditions, as well as other factors such as poverty, the lack of support networks, substance abuse issues, and often a lack of transferable skills for employment in the civilian workforce, veterans disproportionately represent a large percentage of the homeless population in the United States. Veterans make up approximately 12 percent of the homeless adult population, and approximately 150,000 homeless veterans receive specialized health care treatment from the VA each

year. *See Homeless Veterans Background & Statistics, Nat'l Coalition for Homeless Veterans, available at http://nchv.org/index.php/news/media/background_and_statistics (last visited Nov. 7, 2014).* Roughly 50 percent of homeless veterans suffer from a serious mental illness and about 70 percent have substance abuse problems. Moreover, homeless veterans often lack a mailing address, transportation, telecommunications, internet access, and other key resources, making it even more difficult for them to be aware of and fulfill statutory deadlines.

These mental health issues and other life challenges that plague the veteran community, along with the VA's demonstrated penchant for obfuscating the deficiencies in the care it provides, combine to create a frightening mosaic that begs for the applicability of equitable doctrines that prevent injustice to the veteran community. Equitable tolling is such a doctrine, and its applicability to the FTCA should be affirmed.

IV. This Court's Application Of The Common-Law "Discovery Rule" To The FTCA's Statute Of Limitations Requires Upholding "Equitable Tolling" As Well.

Finally, the position advanced by the Government here is antithetical to this Court's embrace of equitable, common-law doctrines when applying the FTCA's statute of limitations in medical malpractice cases brought by veterans against the United States. In *United States v. Kubrick*, 444 U.S. at 113, this Court held that, in medical malpractice cases, the FTCA's two-year statute of limitations begins to run only when the plaintiff knows of both the existence of

his injury and its cause. The Court reasoned that a plaintiff ignorant of his legal rights did not stand on the same footing as a plaintiff ignorant of the fact of his injury or its cause, because the injury in fact "may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122. In contrast, the plaintiff who is aware of both his injury and who inflicted it is "no longer at the mercy of the latter" and may in the exercise of reasonable diligence discover the necessary facts to bring his claim. *Id.*

Importantly, the Court's adoption of the common-law "discovery rule" of accrual in *Kubrick* was a departure from the "general rule" that a tort claim accrues at the time of plaintiff's injury. *Id.* at 121 n.7. The Court's departure from the "general rule" of accrual in favor of the "discovery rule" in this context is particularly notable given the Court's reticence to "graft a discovery rule" onto statutes of limitations absent "textual, historical, or equitable reasons." *See Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013).

The "discovery rule" established by this Court in *Kubrick* has since been applied to FTCA claims countless times by the Courts of Appeal and other courts. *See, e.g., Miller v. Phila. Geriatric Ctr.*, 463 F.3d 266, 271 (3d Cir. 2006) (FTCA claims involving medical malpractice "accrue not at the time of injury, but rather when a plaintiff knows of both the existence and the cause of his injury."); *Nemmers v. United States*, 795 F.2d 628, 629 (7th Cir. 1986) ("The time starts to run in a medical malpractice case when the plaintiff has the information necessary to

discover 'both his injury and its cause.'"); *A.Q.C. ex rel. Castillo v. United States*, 656 F.3d 135, 140 (2d Cir. 2011) ("The diligence-discovery rule sets the accrual date at the time when, with reasonable diligence, the plaintiff has or . . . should have discovered the critical facts of both his injury and its cause.") (citations omitted).

This Court's adoption of the common-law discovery rule to medical malpractice claims under the FTCA supports the application of equitable tolling to such claims. For example, in *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013), the Seventh Circuit correctly held that the FTCA's statute of limitations could be equitably tolled in certain circumstances. Judge Posner wrote that the discovery rule as applied to the FTCA by this Court in *Kubrick* "bolstered" the Seventh Circuit's decision: "as a practical matter the discovery rule extends the statute of limitations by delaying the date on which it begins to run. Yet despite the rule's being a common law rule rather than part of the Federal Tort Claims Act, it has long been accepted as fully applicable to suits under the Act." *Id.*[8]

In light of the above, the Government's reliance on *Kubrick* is sorely misplaced. *See* Brief of Petitioner at 29-30. The Government cited *Kubrick* for the

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[8] Similarly, the Ninth Circuit in *Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1048 (9th Cir. 2013) likewise relied on this Court's application of the discovery rule to hold that equitable tolling applied to claims under the FTCA: the "[a]pplication of a common law discovery rule not enunciated in the statute to aspects of § 2401(b) reinforces the notion that the FTCA's statutes of limitations admit of common law exceptions." *Id.*

proposition that when the United States waives its sovereign immunity, the statute of limitations acts as a condition on that waiver, and the Court "'should not take it upon [itself] to extend the waiver beyond that which Congress intended.'" *Id.* (quoting *Kubrick*, 444 U.S. at 117-18). Yet, mindful of that principle, this Court nevertheless grafted a *common-law* doctrine onto Section 2401(b), found nowhere in the text of the FTCA, which requires federal courts to engage in a fact-intensive inquiry to determine when a plaintiff knew or should have known of both his injury *and its cause*. The Government provides no argument as to how "equitable tolling" extends the United States' waiver of sovereign immunity any further than the discovery rule. The Government's inability to do so confirms that this Court should affirm the applicability of equitable tolling to the FTCA.

On the other hand, a holding in favor of the Government that equitable tolling does not apply would require this Court to reconsider *Kubrick* or find some defensible and administrable basis of distinguishing the application of an equitable common-law doctrine to the FTCA's statute of limitations in the case of accrual, but not doing so in the case of tolling. The Court should not, and cannot, do so.

As an initial matter, beyond the prudential considerations of *stare decisis*, this Court should not overturn *Kubrick*'s holding that the "discovery rule" applies in determining the accrual of medical malpractice claims under the FTCA. As discussed above, the Courts of Appeals have consistently applied – and America's veterans have relied upon – *Kubrick*'s holding for 35 years. Additionally, as described in Parts II & III, *supra*, veterans overwhelmingly rely

on the VA for medical care, and already face numerous obstacles to vindicating their rights when injured by the VA. Injuries from medical malpractice are frequently latent and present themselves years after the "injury" is inflicted. Recent events also show that the VA has a proclivity for concealing evidence from veterans as to the cause of their injuries. Thus, any ruling that did not preserve the discovery rule would be extremely prejudicial to veterans as a group, and *amici curiae* urge the Court to consider carefully how a ruling in favor of the Government would affect the applicability of the discovery rule to Section 2401(b), and at the very least to preserve the status quo applicability of the discovery rule.[9]

Additionally, any attempt to draw a meaningful distinction between the application of the "discovery rule" and the application of "equitable tolling" would be difficult to administer by lower courts. Courts should not be forced to make gossamer distinctions between whether the FTCA's statute of limitations did not expire because the plaintiff was unaware of "the cause" of her injury or did expire because the existence of the claim was fraudulently concealed after the fact.

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[9] Although the Government has only challenged the application of "equitable tolling" to the FTCA, courts have noted the confusion between the "fraudulent concealment" doctrine of equitable tolling and the discovery rule. *See, e.g.*, *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011) (noting "the all-too-common mistake by which the discovery rule is sometimes confused with the concept of fraudulent concealment of a cause of action" (citations and quotations omitted)). Should the Court decide in favor of the Government here, *amici* encourage the Court to expressly exclude the "discovery rule" from its decision.

The facts of the *June* case present a ready-made illustration. When Anthony Booth was killed in the fateful automobile accident, his estate argued that his claim had not accrued because through "reasonable diligence" his estate could not have known that the defective guard rail was the cause of his death. *See June v. United States,* No. 11-901-PHX-SRB, Order Granting Mot. to Dismiss at 3-4, (D. Ariz. Nov. 1, 2011) ECF No. 19. This was because the Federal Highway Administration allegedly concealed information about the fitness of those guard rails. *Id.* Assuming the "discovery rule" applied, but equitable tolling did not, would the claim be saved because plaintiff could not have known of "the cause" of Booth's death, or barred because the claim was merely fraudulently concealed? This example suggests two things: First, the distinctions between accrual and tolling are often arbitrary and amorphous and the survival of a claim should not depend upon the outcome. Second, making such distinctions would do nothing to encourage transparency by federal agencies, especially when litigation is pending or threatened. Given the existing lack of transparency of the VA described in detail above, such an outcome is not only unsound policy, but it is inconsistent with Congress's intent in passing the FTCA.

CONCLUSION

For the foregoing reasons, as well as those offered by Respondent, the decision of the court below should be affirmed.

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AMICUS CURIAE BRIEF

Nos. 13-1074 and 13-1075

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

KWAI FUN WONG,

Respondent.

UNITED STATES OF AMERICA,

Petitioner,

v.

MARLENE JUNE,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PROFESSOR GREGORY C. SISK AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

As amicus curiae and the author of this brief, my name is Gregory C. Sisk.[1] I hold the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). My only interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

For more than a quarter of a century, my scholarly work has focused on civil litigation with the Federal Government. I have published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed. 2006 & Supp. 2012); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed. 2008 & Update 2014). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act. I also have written several law review articles on federal sovereign immunity and construction of statutory waivers of federal sovereign immunity, some of which are cited and adapted into this brief.

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[1] The parties in both cases have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than me as amicus curiae and my employer (the University of St. Thomas, which provides a professional development fund to each faculty member to support scholarly and public service work).

My scholarly publications on Federal Government litigation are cited regularly by the federal courts. *See, e.g.*, *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723, 1729 (2011); *Collins v. United States*, 564 F.3d 833, 836 (7th Cir. 2008); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Carter v. McHugh*, 869 F. Supp. 2d 784, 787 (W.D. Tex. 2012) (addressing the issue of equitable tolling under the FTCA).

In addition to my teaching and scholarly work, I continue to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, I have litigated cases on behalf of both the Government and private parties under statutory waivers of federal sovereign immunity.

SUMMARY OF THE ARGUMENT

The Government's plea for rigid application of time limitations to resist claims of tortious harm undermines the congressional purpose for a remedial statute expressly making the United States liable in the same way as a private person. The Government's strict construction approach contradicts this Court's line of decisions denying special solicitude to the United States in applying limitations periods. This amicus curiae brief seeks to place these controversies in the

larger context of this Court's coalescing jurisprudence of statutory waivers of federal sovereign immunity.

Since the dawn of the twenty-first century, this Court has moved ever more deliberately toward an interpretive approach that reserves jurisdictional analysis, strict construction, and presumptions in favor of the Government to core questions about whether sovereign immunity has been expressly waived and the basic scope of that waiver. *See FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012) (stating that the demand for an "unequivocally expressed" waiver of sovereign immunity extends to "*scope* of that waiver"); *see generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1300 (2014).

By contrast, for other terms, definitions, exceptions, limitations, and procedures in a statutory waiver of federal sovereign immunity, ordinary rules of statutory interpretation and typical expectations for civil litigation generally govern. *See Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (holding that when a "statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," other provisions and terms "'need not . . . be construed in the manner appropriate to waivers of sovereign immunity'" (citations omitted)); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (establishing a "rebuttable presumption" that the same rule of equitable tolling of statutes of limitations "applicable to suits against private defendants should also apply to suits against the United States").

In this way, "[a]n early jaundiced judicial attitude has resolved into a greater respect for the legislative pledge of relief to those harmed by their government." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 521-22 (2008); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 285 (West 2012) (characterizing the supposed corollary that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied" as having "made sense when suits against the government were disfavored, but not in modern times").

In the particular context of the Federal Tort Claims Act (FTCA), the Court has most emphatically moved away from strict construction of statutory waivers of sovereign immunity, instead ensuring that the congressional promise of relief to those harmed by tortious actions of government actors is upheld. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 491-92 (2006) (noting that the interpretation of an exception to liability did not implicate a rule of strict construction, which is "'unhelpful' in the FTCA context" given that the statute "'waives the Government's immunity from suit in sweeping language'" (citations omitted)). Statutory provisions that "prescribe the test of allowable claims" and exceptions to liability fall within the court's jurisdiction to grant or deny a claim, but they are not jurisdictional rules in and of themselves. *See Feres v. United States*, 340 U.S. 135, 140-41 (1950).

Remembering that the FTCA is a *waiver* of sovereign immunity to permit tort suits against the United States, actions alleging tortious harm by federal actors ordinarily should proceed in a manner consistent with private party litigation, *see* 28 U.S.C. § 2674, and against "the backdrop of common law rules of tort law." *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) (stating also "that [federal] statutes of limitations must be read against the embedded practice of equitable tolling").

ARGUMENT

Although the Federal Tort Claims Act (FTCA) is a clear and unequivocal waiver of federal sovereign immunity, the Government nonetheless insists that the time limitations in the statute be considered against the "background assumption that such time bars would be *strictly construed* not to permit equitable tolling." Pet. Br. (Wong) at 16 (emphasis added); Pet. Br. (June) at 12 (emphasis added). *See also* Ugo Colella & Adam Bain, *Revisiting Equitable Tolling and the Federal Tort Claims Act: Putting the Legislative History in Proper Perspective*, 31 Seton Hall L. Rev. 174, 178 (2000) (in this law review article cited repeatedly by the Government to support its case against equitable tolling, the authors "start with the basics" that the FTCA "must be *strictly construed*" (emphasis added)).

Moreover, despite the "garden variety" nature of the statute of limitations found in the FTCA, *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999), the Government asks for the privileged benefit of an absolute *jurisdictional* rule that, unlike ordinary expectations in civil litigation, need not be pleaded as an affirmative defense and cannot be waived. *See* Pet. Br. (Wong) at 16; Pet. Br. (June) at 11-12.

Since the dawn of the century, however, this Court's increasingly common encounters with waivers of federal sovereign immunity have also become more conventional in interpretive attitude. This Court has recognized a dichotomy between the threshold and jurisdictional question of whether sovereign immunity has been waived (requiring a "clear statement" by Congress) and the inquiry into how the statutory waiver should be interpreted and applied (with the canon of strict construction fading away and ordinary tools of statutory interpretation prevailing).

I. While the Federal Government's Consent to Suit by a Clear Legislative Statement is a Jurisdictional Prerequisite, the Terms and Limitations of an Express Statutory Waiver are Not to be Strictly Construed

A. This Court's Strict and Jurisdictional Inquiry Applies to the Threshold Demand for a Clear Statement Waiving Federal Sovereign Immunity

The Federal Government's consent to suit must be expressed through unequivocal statutory text.

United States v. Nordic Village, Inc., 503 U.S. 30, 33-37 (1992). In other words, the courts indulge a "strong presumption against the waiver of sovereign immunity." *See Lehman v. Nakshian*, 453 U.S. 156, 162 n.9 (1981); *see also Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927) (saying that "[t]he sovereignty of the United States raises a presumption against its suability, unless it is clearly shown").

For the Federal Government to be amenable to any suit on a particular theory of liability and for a specific type of remedy, an unambiguous waiver by statute must be shown. In short, jurisdiction lies only when there is "a clear statement from the United States waiving sovereign immunity." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003); *see generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 Boston U. L. Rev. 109, 145-50 (2010); John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 Wis. L. Rev. 771, 773-76, 796-98, 806. Thus, as a jurisdictional precondition to adjudicating a claim against the Government, the preliminary question of whether sovereign immunity has been waived must be addressed by a court on its own initiative.

The premise of "sovereign immunity" is that a government remains exempt from court action unless that government lifts the shield by granting permission to suit. That baseline concept of federal sovereign immunity may be defended as "maintain[ing] a proper balance among the branches of the federal government, and from a proper commitment

to majoritarian rule." Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530 (1992); *see also* Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 Vill. L. Rev. 899, 900 (2010) (arguing that sovereign immunity "enhances democratic rule and fortifies the separation of powers between the political and judicial branches").

Moreover, the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, "lends force to the argument that money judgments against the United States cannot be *paid* without an appropriation from Congress." Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 545 (2003); *see also* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1258 (2009); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 437 n.192 (2010).

By presuming that federal sovereign immunity remains in place absent a clear indication to the contrary through an act of Congress, the Judiciary respectfully allows the political branches to decide when opening the courthouse doors to legal grievances by the subjects of government is morally justified. However, once Congress has acted to permit the claim of the aggrieved against the sovereign to be pursued in a judicial forum, the courts should not frustrate the legislative promise of relief by reconstructing a broader scope of immunity through a misplaced

jurisdictional analysis or a hostile and narrow construction of the statute.

An all-consuming jurisdictional-style imperative for each element of a statutory waiver of federal sovereign immunity would have "drastic" consequences because "[s]ubject-matter jurisdiction can never be waived or forfeited," "objections may be resurrected at any point in the litigation," and courts are obligated to consider jurisdictional requirements sua sponte. *See Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012). The federal courts would be obliged to identify and thoroughly explore each item on an exhaustive (and exhausting) list of every element, limitation, exception, procedural requirement, and time period that conceivably could be invoked as a condition of the statutory waiver of sovereign immunity. Individual claimants would suffer the injustice of not being able to rely upon decisions by government litigators to waive or concede defenses and would be denied equitable accommodations common to civil litigation.

B. This Court No Longer Imposes a Strict Construction on Other Provisions in the Statute After Finding an Unequivocal Waiver of Federal Sovereign Immunity

Putting strict and jurisdictional analysis in its place, this Court has separated the threshold question of *whether* a waiver of sovereign immunity exists

from subsequent questions as to *how* the terms of that waiver should be understood and applied. As to the former, something akin to a "strict construction" or jurisdictional approach continues to apply. On the latter question, strict construction has faded into the background and the ordinary tools of statutory interpretation have moved to the fore.

In *Gomez-Perez v. Potter*, 553 U.S. 474 (2008), this Court most clearly articulated the crucial difference between the preliminary question of whether a statutory waiver of sovereign immunity exists for the subject matter of the suit and later questions about the meaning of substantive provisions and other terms inside the statutory waiver. "[W]here one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision," the Court explained, "that latter provision 'need not . . . be construed in the manner appropriate to waivers of sovereign immunity.'" *Gomez-Perez*, 553 U.S. at 491 (quoting *White Mt. Apache Tribe*, 537 U.S. at 472-73).

Accordingly, the *Gomez-Perez* Court stated, where one provision in a statute "unequivocally waives sovereign immunity," another provision that defines the substantive standard of liability need not "surmount the same high hurdle" of interpretive clarity. *Id.*; *see also Richlin Security Service Co. v. Chertoff*, 553 U.S. 571, 589 (2008) (rejecting the Government's attempt to "seek[ ] shelter" in the canon of strict construction when interpreting a provision allowing awards of fees and expenses against the

Government); *see generally* Gregory C. Sisk, *Twilight for the Strict Construction of Waivers of Federal Sovereign Immunity*, 92 N.C. L. Rev. 1245, 1273-76 (2014).

To be sure, the demand for an unequivocal statutory waiver of federal sovereign immunity and a supposed rule of strict construction sometimes have merged together in judicial rulings. Clarity would be promoted and confusion avoided by consistently characterizing this first-stage analysis as demanding a "clear statement" that federal sovereign immunity has been waived.

In *Orff v. United States*, 545 U.S. 596, 601-02 (2005), for example, the Court held that an attempt by purported third-party beneficiaries to enforce a contract against the United States "founders on the principle that a waiver of sovereign immunity must be strictly construed in favor of the sovereign." However, the basis for the *Orff* decision was that no statute gave consent to a third-party beneficiary of a government contract "to sue the United States alone." *Id.* at 602; *see also Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) (stating the basic and longstanding principle that "[t]he government consents to be sued only by those with whom it has privity of contract").

Accordingly, *Orff* was an example of the clear statement rule on the threshold question of whether sovereign immunity had been waived, not the application of a rule of strict construction in applying an

unequivocal waiver. Sisk, *supra*, 92 N.C. L. Rev. at 1266-67. The validity of the first rule (the clear statement requirement for adducing the existence of a waiver) does not entail continued acceptance of the second proposition (a privileged rule of statutory interpretation for the Government).

II. Statutory Time Limits in Government Cases are Presumptively Non-Jurisdictional in Nature and Applied in a Manner Consistent With Ordinary Expectations in Civil Litigation

A. Because Congress Must Be Presumed to Adopt Limitation Rules in the Light of Background Principles of Civil Litigation, This Court has Established a Rebuttable Presumption in Favor of Equitable Tolling

The traditional attitude of narrow construction in favor of the Government is now more attentively focused on the preliminary question of whether Congress has clearly consented to a type of claim and form of remedy. The arguments for strict construction and jurisdictional rules fade the further the analysis moves past the threshold question of the existence and general scope of a statutory waiver.

This Court's course toward "a less jaundiced approach toward statutory waivers of sovereign immunity is especially well marked in cases involving procedural regulation of the mode of litigation as

contrasted with the substantive scope of waiver legislation." Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 Wm. & Mary L. Rev. 517, 580 (2008); *see also Henderson v. United States*, 517 U.S. 654, 667-68 (1996) (holding that a prior provision in the Suits in Admiralty Act requiring that service of a suit against the Government be made "forthwith" was not jurisdictional because it fell into the category of statutory provisions that have a "'procedural' cast" and "deal with case processing, not substantive rights or consent to suit" (citations omitted)). And under American common law, statutes of limitations traditionally have been understood to be "procedural restrictions" rather than "substantive provisions." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-26 (1988) (discussing choice of law principles).

As an important illustration of the reservation of jurisdictional scrutiny to the core question of whether sovereign immunity has been waived, this Court has regularly turned aside the Government's insistence that statutory time limits should be treated as jurisdictional conditions on the waiver of sovereign immunity.

In *Bowen v. City of New York*, 476 U.S. 467, 478-79 (1986), the Court rejected the Government's argument that the statute of limitations for disability benefit claims under the Social Security Act is "jurisdictional," instead characterizing the provision as "a period of limitations" that may be equitably tolled.

In the landmark decision of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 91-92 (1990), the Court reversed the lower court's ruling that the statutory filing deadline for Title VII employment discrimination claims against the Federal Government "operates as an absolute jurisdictional limit." Even while recognizing that the limitations period for Title VII suits is a "condition to the waiver of sovereign immunity," the Court held that "the rule of equitable tolling [is] applicable to suits against the Government, in the same way that is applicable to private suits." *Id.* at 94-95.

Importantly, *Irwin* did not merely resolve a specific question for a particular statute of limitations, but rather adopted "a more general rule" to supersede the "ad hoc" approach that had produced "continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress." *Id.* at 95. The Court ruled "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96.

Significantly for present purposes, this Court in *Irwin* applied the "rebuttable presumption of equitable tolling" as reflecting likely congressional intent on the limitations period for the employment discrimination provisions of Title VII when extended to the Federal Government as an employer in 1972. Equal Employment Opportunity Act of 1972, § 11, Pub. L. No. 92-261, 86 Stat. 103, 111 (codified at 42 U.S.C. § 2000e-16). The Title VII statute construed in *Irwin*

thus had been enacted nearly contemporaneously with the congressional expansion of the FTCA statute of limitations six years earlier. Act of July 18, 1966, Pub. L. No. 89-506, §§ 2(a), 7, 80 Stat. 306, 307.

Congress in 1972 extended Title VII to afford more equitable treatment of federal employees and to hold the United States more equally to the same prohibition on employment discrimination that applied to private parties. Congress in 1966 eased the limitations rules of the FTCA for the "purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." H.R. Rep. No. 89-1532, at 5 (1966); S. Rep. No. 89-1327, at 2-3 (1966).

Subsequent to *Irwin*, the Court held that an otherwise-timely application for attorney's fees under the Equal Access to Justice Act, which did not contain the statutorily-required allegation that the Government's position was not "substantially justified," could be amended to cure this defect after the 30-day filing period had expired. *Scarborough v. Principi*, 541 U.S. 401, 420-421 (2004). There too, the Federal Government insisted that "[t]he requirement of filing a timely fee application that has the prescribed content is a condition on the federal government's waiver of sovereign immunity" and thus must be strictly applied. Brief for the Respondent at 18-19, *Scarborough v. Principi*, 541 U.S. 401 (2004) (No. 02-1657).

In *Scarborough*, this Court reiterated that "[o]nce Congress waives sovereign immunity, we observed [in *Irwin*], judicial application of a time prescription to suits against the Government, in the same way the prescription is applicable to private suits, 'amounts to little, if any, broadening of the congressional waiver.'" *Scarborough*, 541 U.S. at 421 (quoting *Irwin*, 498 U.S. at 95).

The Court's treatment of time limitations in suits against the Government in a manner consistent with ordinary expectations arising in private litigation stands in contrast with the stricter approach toward those statutory provisions that grant the essential permission to sue. This reflects an appreciation of the distinct differences in nature and purpose between these types of provisions. The primary purpose of a statute of limitations is fairness to the defendant and efficiency of the litigation process, *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); Note, *Developments in the Law – Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950), rather than protection of the sovereign Government from unconsented claims. And given that the availability of equitable tolling is "hornbook law," "Congress must be presumed to draft limitations periods in light of this background principle." *Young v. United States*, 535 U.S. 43, 49-50 (2002).

B. The *Stare-Decisis* Detour in *John R. Sand & Gravel* is a Narrow Exception to the General Expectation That Time Limits in Government Suits are Subject to Equitable Tolling

On occasion, with an exceptional statute of limitations in a statutory waiver of federal sovereign immunity, this Court has found the *Irwin* presumption in favor of equitable tolling to be rebutted. In *United States v. Brockamp*, 519 U.S. 347, 352 (1997), the Court found that the statutory limitations period on filing claims for tax refunds could not be equitably tolled due to the tax statute's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions." In *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998), the Court held that equitable tolling is not available in a suit against the United States under the Quiet Title Act, which provides an "unusually generous" twelve-year limitations period.

The Court reached these conclusions in *Brockamp* and *Beggerly* based upon distinct and exceptional characteristics of these particular statutory time limits – not by characterizing a statute of limitations as a jurisdictional requirement or by reciting a formulaic commitment to strict construction.

The narrow exception to this pattern is *John R. Sand & Gravel v. United States*, 552 U.S. 130 (2008), where the Court held that the statute of limitations for money claims in the Court of Federal Claims,

28 U.S.C. § 2501, was jurisdictional in nature and not subject to exceptions. Importantly, rather than discarding *Irwin* or questioning the rebuttable presumption for equitable tolling of limitations periods for suits against the Government, the Court invoked *stare decisis* to adhere to nineteenth century cases which had declared this particular statute of limitations to be jurisdictional. *Id.* at 134-39; *see also* Sisk, *supra*, 50 Wm. & Mary L. Rev. at 525 (characterizing *John R. Sand & Gravel* as a "*stare decisis*-justified detour").

The Court in *John R. Sand & Gravel* forthrightly fixed its strict and jurisdictional reading of a particular statute of limitations squarely and narrowly on *stare decisis* and disclaimed an intent to divert from the path that the law of federal sovereign immunity has taken in recent decades. Indeed, this Court acknowledged there had been "a turn in the course of the law," specifically in the interpretation of statutes of limitations in government cases, which now "place[s] greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds." *John R. Sand & Gravel*, 552 U.S. at 138. Older decisions such as *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887), while preserved in their specific application by *stare decisis*, "have consequently become anomalous," *see John R. Sand & Gravel*, 552 U.S. at 138, and thus not to be extended to other situations or statutes.

Notably, by relying so heavily on the early Tucker Act decisions of *Kendall* and *Finn*, the Government effectively does an end-run around the central question of statutory intent. *See* Pet. Br. (Wong) at 22, 23, 24, 30, 32, 40, 43; Pet. Br. (June) at 20, 21, 28, 29, 38, 40, 41. To the extent that the FTCA statute of limitations is similar in language to the Tucker Act statute of limitations, then what the Government calls "traditional tools of statutory construction" should be central. *See* Pet. Br. (Wong) at 20; Pet. Br. (June) at 17.

But *Kendall* and *Finn* were exercises in judicial implication of jurisdictional absolutes rather than models of statutory interpretation focused on the text, historical context, and legislative history. Indeed, the Court in *Finn* acknowledged departing from "the ordinary legal principle that 'limitation . . . is a defence [that a defendant] must plead.'" *John R. Sand & Gravel*, 552 U.S. at 135 (characterizing and quoting *Finn*, 123 U.S. at 232-33). Instead, *Kendall* and *Finn* "are perhaps best understood as the Supreme Court's hesitant and skeptical introduction to what was then a new category of legislation that afforded general judicial remedies against the government for monetary claims based on governmental wrongs." Sisk, *supra*, 50 Wm. & Mary L. Rev. at 551.

Returning to first principles of statutory interpretation, Congress began in the nineteenth century to craft federal statutes of limitations to say that a claim is "forever barred" when not timely filed after accrual. *See, e.g.*, Act of Mar. 3, 1863, ch. 92, § 10, 12

Stat. 765, 767 (providing that claims against the United States in the Court of Claims "shall be forever barred" unless filed within six years after accrual); Act of Aug. 5, 1886, 24 Stat. 335 (providing that persons making claims against the United States as to certain lands in the District of Columbia must appear in court to litigate the claim after public notice or they "shall be deemed forever barred from setting up or maintaining any right, title, interest or claim in the premise").

In doing so, Congress unremarkably adapted language from ordinary state statutes of limitations of that period. *See* Joseph K. Angell, *A Treatise on the Limitation of Actions at Law and Suits in Equity and Admiralty* xxxiii to clxi (Little Brown & Co., 4th ed. 1861) (setting out state statutes of limitations). *See, e.g.*, *Proprietors of White School House v. Post*, 31 Conn. 240, 253-54 (Conn. 1862); *Ferrall v. Irvine*, 12 Iowa 52, 54 (Iowa 1861); *Stone v. Sanders*, 38 Tenn. 248, 250 (Tenn. 1858); *Miller v. Trustees of Jefferson College*, 13 Miss. 651, 661 (Miss. 1846).

In *Sanger v. Nightingale*, 122 U.S. 176 (1887), a diversity of citizenship case, the Court considered a Georgia statute providing that actions upon a debt which accrued during the Civil War had to be filed "by first January, 1870, or both the right and right of action to enforce it shall be forever barred." *Id.* at 184 (quoting Georgia statute). In response to the argument that this supposedly peremptory language "in effect destroys" an untimely claim, the Court cited to Georgia court rulings that this was "an ordinary

statute of limitations" that still had to be pleaded as an affirmative defense. *Id.* at 184-95.

When limitations language common to state litigation is incorporated into federal statutes, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn. v. Solimino,* 501 U.S. 104, 108 (1991). Indeed, when enacting the statute of limitations for the then-Court of Claims in 1863 with the familiar "forever barred" phrasing, a leading senator stated: "As this bill proposes to throw open this court to all claimants, I think the same statute of limitations ought to be applied to existing claims as would be applied between private individuals." Cong. Globe, 37th Cong., 3rd Sess. 414 (1863) (Sen. Sherman).

Beginning during this period and leading up to the date when the Federal Tort Claims Act was enacted, this Court has recognized that "the weight of judicial authority, both in this country and in England," favored the rule tolling a statute of limitations, both in law and equity, when a claim had been fraudulently concealed by the defendant. *Bailey v. Glover*, 88 U.S. 342, 347-49 (1874); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine [tolling the statute of limitations when the plaintiff has been injured by fraud] is read into every federal statute of limitation.").

Congress has integrated the "forever barred" phrase in many other statutes in the ensuing decades, statutes that have been understood to be subject to

equitable tolling. *See, e.g.*, *Public Serv. Co. v. General Elec. Co.*, 315 F.2d 306, 311 (10th Cir. 1963) (rejecting argument that the Clayton Act statute of limitations, 69 Stat. 283 (1955), which provides that an antitrust cause of action "shall be forever barred" unless commenced within four years, is "absolute" and instead holding that it is tolled by fraudulent concealment); *Partlow v. Jewish Orphans' Home of Southern California*, 645 F.2d 757, 760-61 (9th Cir. 1981) (applying equitable tolling to the Fair Labor Standards Act statute of limitations, 61 Stat. 84, 88 (1947), which provides that a claim is "forever barred" if not filed within two years). As the Court of Appeals observed below, by the middle of the twentieth century, when the FTCA was enacted, the "forever barred" phrasing had become part of "congressional drafting conventions." Pet. App. (Wong) at 18a.

Indeed, when not bound by precedent on a specific point, this Court has recognized a government suit limitations period framed with "forever barred" language as a run-of-the-mill statute of limitations to be understood in the light of ordinary common-law principles. In *Franconia Associates v. United States*, 536 U.S. 129 (2002), after re-examining the text and historical context of the predecessor statute, the Court unanimously found 28 U.S.C. § 2501 to be an "unexceptional" statute of limitations, comparable in text to "[a] number of contemporaneous state statutes of limitations applicable to suits between private parties." *Id.* at 145. Rejecting the government's entreaty for a "special" rule of accrual to benefit the sovereign, the Court characterized the government's

proposition as "present[ing] an 'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than 'a realistic assessment of legislative intent.'" *Id.* (citations omitted).

III. The Federal Tort Claims Act Waives Sovereign Immunity in Sweeping Language, Precluding a Strict and Jurisdictional Reading of Its Substantive Provisions, Limitations, and Exceptions

A. The FTCA Expressly Confers Jurisdiction in a Single and Specific Section, Which This Court has Identified as Setting the Jurisdictional Parameters of the Statute

The Federal Tort Claims Act (FTCA) simultaneously waives sovereign immunity for tort claims against the United States and confers exclusive jurisdiction over such claims to the United States District Courts. 28 U.S.C. § 1346(b)(1). By virtue of being formulated as part and parcel of a new jurisdictional grant to the federal courts, the basic scope of this statutory waiver is coextensive with the parameters of federal subject matter jurisdiction.

Not every statutory provision that relates to the waiver of immunity for tort claims in the FTCA constitutes a jurisdictional imperative. "[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y&H*

Corp., 546 U.S. 500, 516 (2006); *see also* Howard Wasserman, *Jurisdiction, Merits, and Procedure: Thoughts on Dodson's Trichotomy*, 102 Nw. U. L. Rev. Colloquy 215, 216 (2008) ("[C]ourts should consider a provision of positive law as jurisdictional only when its plain language is addressed to the court and speaks in terms of judicial power about the class of cases that courts can hear and resolve.").

This Court already has identified the specific location of the jurisdictional grant in the FTCA and defined its limited jurisdictional constraints:

First, in *Feres v. United States*, 340 U.S. 135, 140-41 (1950), one of the earliest decisions interpreting the FTCA, the Court explained that the statute "confers jurisdiction to render judgment upon all such claims," that is, over civil actions for money damages against the United States, "[b]ut it does not say that all claims must be allowed." "Jurisdiction of the defendant now exists where the defendant was immune from suit before," but the Court added, "it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law." *Id.* at 141.

In other words, the statutory section withdrawing immunity and granting authority to the District Court supplies the jurisdictional prerequisite. Other FTCA provisions that "prescribe the test of allowable claims" and "exceptions" to liability fall within the court's jurisdictional power to grant or deny a claim,

but are not jurisdictional rules in and of themselves. *See id.* at 140-41.

Second, in *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475-86 (1994), the Court considered whether the FTCA superseded a statute that generally permits a particular agency to "sue and be sued" and thereby precluded a direct claim for money damages against the agency for a constitutional violation. By express directive, the FTCA is the exclusive venue for suits against agencies that are authorized to "sue and be sued" in their own name *if* the claim is "cognizable" under the FTCA, 28 U.S.C. § 2679(a). Defining "cognizable" as meaning that a claim is within the adjudicative authority of a court, the Court ruled that this "inquiry focuses on the jurisdictional grant provided by § 1346(b)." *Meyer*, 510 U.S. at 476.

Examining Subsection 1346(b)(1), which speaks in the language of jurisdiction, the *Meyer* Court explained that it "grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed],' itself liable." *Meyer*, 510 U.S. at 477 (citations omitted). The jurisdictional parameters of the FTCA thus include that "category" of claims which "allege the six elements" outlined in Subsection 1346(b)(1), namely a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) caused by the negligent or wrongful act or omission of any employee of the United States, (5) while acting

within the scope of his office or employment, (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred. *Id.*

In sum, when a tort claim against the United States alleges the six basic elements set out in Subsection 1346(b)(1), the claim "comes within this jurisdictional grant" of the FTCA. *Meyer*, 510 U.S. at 477. For jurisdictional purposes, we need look no further.

Bypassing these decisions, the Government suggests that other provisions in the FTCA are jurisdictional conditions by virtue of the provision in Subsection 1346(b)(1) that the court's exercise of jurisdiction over an FTCA claim is "[s]ubject to the provisions of chapter 171 of this title." *See* Pet. Br. (Wong) at 36; Pet. Br. (June) at 34; *see also* Pet. App. (Wong) at 53a-54a (Tashima, J., dissenting).

But this language in Subsection 1346(b)(1) is an unremarkable cross-reference to other elements of the FTCA – ranging from definitions through congressional reports to exceptions to liability. Some of these provisions are simply not susceptible to any jurisdictional reading and others are the substantive standards for and exceptions to liability presented elsewhere in the statute in non-jurisdictional form. In any event, the time limitations of the FTCA in Section 2401 are not part of Chapter 171.

Moreover, the Government's premise that any supposed "condition" on the waiver of sovereign immunity takes on jurisdictional force has no logical

stopping point. *See* Pet. Br. (Wong) at 3, 16, 42; Pet. Br. (June) at 6, 12, 27. Reformulating every element of the FTCA into a non-waivable and absolute jurisdictional requirement would impose a severe burden on the courts, which is impossible to attribute to Congress.

By the Government's lights, for example, every court hearing a case under the FTCA at the trial or appellate level would be obliged to raise sua sponte and fully evaluate every single one of the multiple exceptions to liability in 28 U.S.C. § 2680, whether or not the Government has raised that defense and even when the Government has explicitly abandoned it. Yet in prior cases, such as *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955), and *Block v. Neal*, 460 U.S. 289, 294 (1983), this Court observed that the government had conceded that the discretionary function exception was not implicated, a concession the Court did not question as it would have been obliged to do were it a jurisdictional element. Importantly, in the two decades since the Court clarified the jurisdictional reach of the FTCA in *Meyer*, no decision has ascribed jurisdictional significance to an exception.[2] *See generally* Sisk, *supra*, 50 Wm. & Mary L. Rev. at 559-60.

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[2] This Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), is no exception to that post-*Meyer* avoidance of jurisdictional language in discussing FTCA exceptions. The Court said that foreign substantive law might apply in FTCA cases "if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign

(Continued on following page)

Indeed, in the more recent decision of *Dolan v. U.S. Postal Service*, 546 U.S. 481 (2006), this Court explained that it was inclined to construe these exceptions more narrowly, so as not to defeat the sweeping purpose of the FTCA in waiving sovereign immunity, an approach hard to reconcile with a stringent jurisdictional analysis.

In *Dolan*, the Court began by placing the pertinent FTCA provision in context within the act as a whole, separating the liability exception at issue from the core provisions that grant subject matter jurisdiction and accomplish the waiver of sovereign immunity. *See id.* at 483-85. The Court observed that the waiver of sovereign immunity for the FTCA comes in two sections of the code, the first of which "confers federal-court jurisdiction in a defined category of cases involving negligence committed by federal employees in the course of their employment," and the second of which directs that the United States is liable in the same manner as a private person under

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harm" that had been planned or supervised inside the borders of the United States. *Id.* at 710. This potential invocation of foreign law was another reason to read the foreign country exception, 28 U.S.C. § 2680(k), as barring claims involving injury in another nation. *Sosa*, 542 U.S. at 710. In this part of the opinion, the Court was speaking of "jurisdiction" primarily in terms of the geographic location of the court, whether in one or another state or country, with choice of law consequences, rather than in terms of federal judicial authority to hear a particular class of claims. In any event, the Court did not suggest that the FTCA exception was a nonwaivable jurisdictional prerequisite. *See id.* at 710-12.

like circumstances but not for prejudgment interest or punitive damages. *Id.* at 484-85 (citing 28 U.S.C. §§ 1346(b)(1), 2674). By contrast, the "qualifi[cation of the FTCA] waiver of sovereign immunity for certain categories of claims" through thirteen exceptions is found in a separate and non-jurisdictional section. *See id.* at 485.

Moreover, the *Dolan* Court emphasized that the nature of the statutory provision at issue affects the manner in which it should be construed. Thus, the Court "noted that this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Id.* at 491 (quoting *Lane v. Pena*, 518 U.S. 187, 192 (1996)). The Court explained that "this principle is 'unhelpful' in the FTCA context, where 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 491-92 (citations omitted).

B. The FTCA Generally Places the United States on Equal Footing With Private Parties and Should be Interpreted Against the Backdrop of the Common Law of Torts

By so "waiv[ing] the Government's immunity from suit in sweeping language," *Dolan*, 546 U.S. at 492, the FTCA has been a leading example of "the

progressive relaxation by legislative enactments of the rigor of the immunity rule." *Dalehite v. United States*, 346 U.S. 15, 30 (1953). Congress enacted the FTCA in 1946 as both a matter of equity to citizens and to relieve itself of the burden of considering a multitude of private bills. *See* Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842; *see also* H.R. Rep. No. 79-1675, at 25 (1945) (stating that the FTCA should be applied "with justice and equity . . . to the claimants").

By the express language of the FTCA, the Federal Government "shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. In other words, the United States is liable under the FTCA on the same basis and to the same extent as recovery would be allowed for a tort committed under like circumstances by a private person in that state. *Olson v. United States*, 546 U.S. 43, 44 (2006).

The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, Congress determined "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law. *Richards v. United States*, 369 U.S. 1, 7 (1962); *see also* John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 114 (2001) (stating that federal tort statutes should be interpreted "against the backdrop of common law rules of tort law").

Upholding the general purpose of the FTCA to place the United States on equal footing with private parties, this Court regularly has applied principles of federal tort liability that are consistent with expectations in private tort litigation:

In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-83 (1949), this Court rejected the Government's plea for strict construction and held that the United States may be sued under the FTCA by a subrogee just as a private defendant.

In *United States v. Yellow Cab Co.*, 340 U.S. 543, 554-56 (1951), the Court again turned away a strict construction argument and held that the Federal Government may be impleaded as a third-party defendant under the FTCA by another tortfeasor seeking contribution. *See also Dalehite*, 346 U.S. at 31-32 & n.26 (saying that, "[w]here jurisdiction was clear" under the FTCA, the Court has "allowed recovery despite arguable procedural objections," such as by allowing the United States to be sued in tort for contribution and impleaded as a third party).

Perhaps most significantly for present purposes, in *United States v. Kubrick*, 444 U.S. 111, 113 (1979), this Court incorporated a "discovery rule" into the FTCA statute of limitations, holding that the time period does not begin to run until the injured person "knows both the existence and the cause of his injury." *See generally* Gregory C. Sisk, *Litigation With the Federal Government* § 3.03(b)(2), at 114-15 (ALI-ABA, 4th ed. 2006) (explaining that "there is a consensus

among the Courts of Appeals that a discovery rule applies generally for accrual of claims in all tort cases under the FTCA").

The availability of equitable tolling under the FTCA is "[b]olster[ed]" by the *Kubrick* Court's recognition of the discovery rule, which is part of the common law rather than the text of the FTCA and which as a practical matter "extends the statute of limitations by delaying the date on which it begins to run." *Arteaga v. United States*, 711 F.3d 828, 833 (7th Cir. 2013); *see also* Jacob Damrill, Note, *Waves of Change Towards a More Unified Approach: Equitable Tolling and the Federal Tort Claims Act*, 50 Tulsa L. Rev. 271, 297 (2015) ("The simple recognition [in *Kubrick*] that the statute of limitation does not begin to run until discovered – a common-law tort rule – supports the proposition that section 2401(b)'s limitations period is not absolute and is instead subject to equitable enlargement as is any normal tort claim."). Interestingly, before the Court of Appeals below, the Government acknowledged that this Court's construction of the FTCA statute of limitations in *Kubrick* was based on "equitable considerations" and effectively allowed for equitable tolling (while of course arguing that no further equitable accommodations should be made). Supplemental En Banc Opening Brief of the United States at 8, *Kwai Fun Wong v. Beebe*, 732 F.3d 1030 (9th Cir. 2013) (en banc) (No. 10-36136).

Accordingly, a statutory time limit in the FTCA, 28 U.S.C. § 2401(b), which is not included within the general section waiving sovereign immunity and

simultaneously conferring district court jurisdiction, should not be given a jurisdictional read or regarded as a nonwaivable constraint on judicial authority. Every Court of Appeals to address the question has recognized that the FTCA contains "a garden variety limitations provision," *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999), and has held or suggested that the FTCA provision is not jurisdictional and instead falls within the *Irwin* presumption that statutes of limitations in government cases are subject to equitable tolling. Given the equitable and remedial purposes of the FTCA, that conclusion is correct. *See Dalehite*, 346 U.S. at 24-25 (saying the FTCA was intended by Congress to "afford[] easy and simple access to the federal courts for torts within its scope").

CONCLUSION

In recent years, this Court has been steadily moving away from a parsimonious judicial attitude toward statutory waivers of sovereign immunity. The Government should not be granted two layers of presumptive protection, *both* on whether a waiver of sovereign immunity exists *and* on what terms, conditions, limitations, and procedures apply to that waiver. When there is a clear and unequivocal statutory waiver of sovereign immunity, the Government has shed the cloak of immunity and should generally be subject to the same limitation principles that apply to private civil litigants.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1075

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MARLENE JUNE, CONSERVATOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Tort Claims Act's two-year limitations period for presenting an administrative claim may be equitably tolled in appropriate cases.

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INTEREST OF *AMICUS CURIAE*[*]

Southeastern Legal Foundation (SLF) is a public interest law firm that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the federal circuit courts and the Supreme Court of the United States. SLF has an abiding interest in defending American businesses and families from excessive restriction by overzealous or unresponsive government agencies, and in challenging irresponsible government spending and regulation.

INTRODUCTION

The government's reading of the Federal Tort Claims Act (FTCA) is a clear example of excessive governmental restrictions that, if adopted, would ultimately result in irresponsible government spending. The government's view would incentivize plaintiffs to bring administrative FTCA claims when there is only a vague suspicion that the federal government might be involved, just to meet the two-year statute of limitations. This "file first, ask questions later" approach to FTCA claims would result in a flood of underdeveloped "just in case" claims that multiply agency expenditures and ultimately harm the taxpaying public.

In addition, the government's reading of the FTCA directly contravenes Congress's intent to put the gov-

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[*] The parties consented to the filing of this brief. The letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, has contributed monetarily to the preparation or submission of this brief.

ernment in a position as similar as possible to that of a private tort defendant. In defending FTCA cases, the government routinely asserts the same state-law defenses that are available to similarly situated private defendants, so that government liability is not enlarged beyond that of such defendants. Here, however, the government seeks special procedural advantages unavailable to private defendants in tort litigation. If adopted, the government's rule would arbitrarily insulate federal administrative agencies from responsibility for injuries to private citizens and business. Just as private tort defendants are subject to equitable tolling principles, however, so too should the government be.

STATEMENT

1. Congress passed the FTCA in 1946, as "the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres* v. *United States*, 340 U.S. 135, 139 (1950). The Act sought both to ensure that the government "assume[s] the obligation to pay damages for the misfeasance" of federal employees and to replace the "notoriously clumsy" system of private bills in Congress with a "simplified recovery procedure" for tort claims. *Dalehite* v. *United States*, 346 U.S. 15, 24-25 (1953).

The original Act included a statute of limitations providing that a claim "shall be forever barred, * * * unless within one year after such claim accrued * * * an action is begun." Pub. L. No. 79-601, § 420, 60 Stat. 843, 845. Congress provided an alternative for claims not exceeding $1,000, which could be presented to the relevant federal agency within one year. If the agency denied settlement, the claimant could sue in federal court within six months of that action.

Ibid. Three years later, Congress extended the limitations period to two years. See Pub. L. No. 81-55, § 1, 63 Stat. 62. And in 1959, Congress increased the settlement limit from $1,000 to $2,500. See Pub. L. No. 86-238, 73 Stat. 471, 471-472.

Congress enacted its next significant reform of the tort claim process in 1966, when it shifted the primary administrative burden of claims from the courts to federal agencies by removing the cap on agency settlements (with Attorney General approval required for settlements above $25,000) and requiring all claimants to present their claims initially to the appropriate federal agency. See generally Pub. L. No. 89-506, §§ 1-2, 80 Stat. 306. In keeping with these changes, Congress amended the statute of limitations to require presenting claims to agencies within two years of injury and filing of suit within six months of the agency's final denial of the claim. *Id.* § 7. These reforms were intended to "ease court congestion and avoid unnecessary litigation" while also ensuring "more fair and equitable treatment of private individuals and claimants." *Odin* v. *United States*, 656 F.2d 798, 801-802 (D.C. Cir. 1981) (citation omitted).

2. The FTCA's current statute of limitations provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b). And as this court held in *United States* v. *Kubrick*, 444 U.S. 111, 113 (1979), this statutory two-year period for presentation begins "when the plaintiff knows both the existence and the cause of his injury."

3. This case arises out of the death of Anthony Edward Booth. On February 19, 2005, Booth was the passenger in a vehicle that crossed the median of Interstate 10 in Phoenix, Arizona. A cable median barrier was in place, but failed to divert the vehicle. The car collided with oncoming traffic, killing Booth. Pet. App. 3a-4a.

In February 2006, respondent Marlene June, acting as conservator for Booth's minor son, initiated a wrongful death action against a contractor and the State of Arizona, alleging that the median barrier had been negligently installed and maintained. J.A. 26-33. Because a September 12, 2005, memorandum issued by the Federal Highway Administration (FHWA) had asserted that the type of barrier involved in the accident was considered "crashworthy" and approved for use on the National Highway System (NHS), June pressed no claims against the federal government. See J.A. 145-148.

4. In early 2007, June's counsel sought to depose employees of the FHWA regarding the median barrier design. The FHWA refused to make the employees available for two years—until April 29, 2009. J.A. 146. When the depositions were finally taken, they revealed that, contrary to the 2005 memorandum, the cable median barrier design involved in the accident had not met the required standards for use on the NHS and in fact had failed an August 2005 crash test. *Ibid.*

Armed with this new information, June submitted an administrative claim to the FHWA on December 20, 2010. The FHWA denied the claim as untimely on March 18, 2011. J.A. 148-149.

5. In May 2011, June filed this FTCA suit, alleging that the FHWA negligently and in violation of its own regulations allowed Arizona to install a defective cable median barrier. J.A. 117-124. The government moved to dismiss, asserting that the district court lacked jurisdiction under 28 U.S.C. § 2401(b) because respondent had failed to present a claim to the FHWA within two years of the February 2005 accident. J.A. 125-140. The district court agreed. It ruled that the claim accrued at the time of the accident, and that equitable tolling was foreclosed by the Ninth Circuit's decision in *Marley* v. *United States*, 567 F.3d 1030 (9th Cir. 2009), which held that the timing provisions of 28 U.S.C. § 2401(b) are jurisdictional and thus not subject to equitable exceptions. Pet. App. 3a-12a.

6. June appealed the equitable tolling question. While the appeal was pending, the Ninth Circuit issued its en banc opinion in *Wong* v. *Beebe*, 732 F.3d 1030 (9th Cir. 2013). The court there overruled *Marley*, holding that § 2401(b) is not jurisdictional, and thus that "equitable adjustment of the limitations period in § 2401(b) is not prohibited." *Id.* at 1051. Citing *Wong*, the Ninth Circuit later reversed the district court's ruling here, and the government successfully sought certiorari.

SUMMARY OF ARGUMENT

I. If the rule that the government proposes here were adopted, no FTCA claim asserted more than two years after injury would *ever* be timely, without regard to the circumstances of the case or longstanding principles of equity. As respondent has explained, such a rule against equitable tolling finds no basis in the FTCA's text, structure, history, or purpose. In addition, however, such a rule would create troubling incentives—incentives that undermine basic principles of good and accountable government.

Specifically, ordinary citizens who might have been injured by the government would have every incentive to file FTCA claims with federal agencies, simply to avoid any risk of forfeiting the claims under an unbending two-year time limit. Whenever there was any remote chance that the federal government was responsible, injured parties would clog agencies with claims that typically prove meritless and unnecessary down the road—creating government waste and inefficiency, and ultimately harming American taxpayers.

Nor would these administrative costs and harm to taxpayers be trivial. As the statistics discussed below confirm, administrative claims under the FTCA arise in myriad contexts and are already voluminous. If equitable tolling becomes unavailable, the incentive to submit claims where there is any chance of federal involvement promises to increase the volume of claims by many times. Such a result would impose millions of dollars of costs on taxpayers—costs that could largely be avoided under a regime, like the current one, that allows equitable tolling in appropriate circumstances.

II. Making equitable tolling unavailable would also be inconsistent with the FTCA's central goal—putting the government in the shoes of similarly situated private tort defendants. In enacting the FTCA, Congress deliberately made the government liable for its torts "in the same manner and to the same extent" as analogous private defendants under state law. 28 U.S.C. § 2674. In a wide variety of FTCA cases, the government has successfully invoked this equal treatment rule—even when the government cannot comply with certain express technical requirements of applicable state law. Since private tort parties can generally invoke equitable tolling to ensure the timeliness of their claims in appropriate circumstances, Congress's goal of equal treatment is best advanced by applying equitable tolling to FTCA claims.

ARGUMENT

I. Barring equitable tolling of the FTCA's two-year limitations period would create undue incentives for parties to file underdeveloped and typically baseless administrative claims.

Should this Court adopt the government's reading of § 2401(b), such a ruling would create improper and undesirable incentives for FTCA plaintiffs to flood federal agencies with claims that are underdeveloped —and that typically prove baseless down the road. Wherever federal involvement in an injury was remotely possible, but difficult to uncover within two years, the absence of equitable tolling would discourage deeper, good-faith investigation into the facts while private litigation is pending. The government's reading of the statute would encourage a "file first, ask questions later" approach to FTCA claims.

Currently, provided the plaintiff is reasonably diligent but basic facts about the federal government's role in causing her injury are concealed, the plaintiff's counsel can argue that the FTCA's two-year limitation period runs only after the plaintiff discovered (or should have discovered) such concealed facts. But if this Court ruled that the two-year period is jurisdictional—and may *never* be tolled—the situation would be dramatically different. Wherever there was even the slightest possibility that federal government activity was connected to the injury, counsel would be compelled to file protective, "just in case" administrative claims within two years to avoid malpractice liability.

The costs of these wasteful administrative claims would ultimately be borne by the taxpaying public, and statistics concerning FTCA claim submissions and payments show that the costs would be substantial. FTCA claims affect an array of federal agencies and are already voluminous. Creating an incentive to submit claims within two years would multiply such claims several times over. That is not an acceptable price to pay for the advantage that the government seeks here, especially when the result would insulate the government from tort liability where its involvement was concealed from private plaintiffs—perhaps even intentionally.

A. If tolling became unavailable in difficult FTCA cases involving obscured facts, plaintiffs would be compelled to present a flood of underdeveloped, and typically baseless, administrative claims.

1. Diligent FTCA plaintiffs often find they can initially do little more than speculate as to whether

their injury was caused by a federal agent, and then investigate that possibility using the limited available information. But under a system that allows for equitable tolling in appropriate cases, such plaintiffs will not immediately rush off and file administrative claims. Rather, they will recognize that such claims should not typically be based on "a mere hunch, hint, suspicion, or rumor." See *Kronisch* v. *United States*, 150 F.3d 112, 121 (2d Cir. 1998). Merely suspecting that the federal government is involved does not cause "[a] claim" to "accrue"; it simply gives rise to a duty of inquiry. *Ibid.*

Like the discovery accrual rule, the equitable tolling regime recognized by the court below (and many other circuits) requires a plaintiff to exercise reasonable diligence in investigating her injuries to determine their cause and exercise her rights in a timely fashion. "Long-settled equitable-tolling principles instruct that generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Wong* v. *Beebe*, 732 F.3d 1030, 1052 (9th Cir. 2013) (alterations and quotations omitted). Thus, if and when plaintiffs "susp[ect] that [a federal agent] [is] partially to blame for their woes, it [is] incumbent on [them] to search out relevant information about [the agent's potential] role" in causing their injuries, "or risk losing their claims." *Rakes* v. *United States*, 442 F.3d 7, 23 (1st Cir. 2006).

Under an equitable tolling regime, therefore, a rational plaintiff will continue investigating to determine whether she has a claim. Submitting an administrative claim based on supposition is unlikely to result in recovery, and if diligent investigation leads to

unexpected discoveries as to the cause of the injury, the claim may be submitting at a later date. Whether the plaintiff submits an administrative claim will depend on what she unearths to substantiate or dispel the possibility of the government's involvement.

But where equitable tolling is *not* available, a rational plaintiff has every incentive to submit an administrative claim—even if it is supported only by "a mere hunch, hint, suspicion, or rumor." See *Kronisch*, 150 F.3d at 121. The plaintiff's diligence in continuing to investigate any federal involvement, and the fruits of that investigation, become irrelevant once the claim is time-barred. A rule that barred equitable tolling would virtually guarantee the government's need to respond to administrative claims in a much higher percentage of cases—claims based on whatever suppositions the plaintiff can muster. And if any doubt remained, the specter of malpractice liability would further tip the scales toward submitting an administrative claim—at least where the plaintiff is represented by counsel and there is any sign that the federal government might be involved.

2. As a review of the lower-court decisions issued since *Kubrick* confirm, there are myriad circumstances in which federal involvement is possible but difficult to discover. The most common fact pattern involves automobile crash cases like this one, where road safety features have potentially played a role in the plaintiff's injury.[1] If the government's view becomes the law, plaintiffs with even the most speculative basis for asserting claims against the FHWA are

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[1] In addition to the decision below, see also, for example, *Miller* v. *United States*, 710 F.2d 656 (10th Cir. 1983); *Rothrock* v. *United States*, 62 F.3d 196 (7th Cir. 1995).

likely to do so, even when the basis for such a claim is purely speculative.

Medical malpractice claims provide another fertile ground for presenting underdeveloped FTCA claims. Besides the thousands of medical malpractice claims brought against the Veterans Administration, there are also many cases in which there is at least some possibility that a medical practitioner involved in the case received federal funds from, and might be deemed a federal actor under, the Federally Supported Health Centers Assistance Act of 1992, as amended at 42 U.S.C. § 233(g)-(n). See, *e.g.*, *Drazan* v. *United States*, 762 F.2d 56 (7th Cir. 1985) (involving a medical malpractice claim against the Veterans Administration); *Santos ex. rel. Beato* v. *United States*, 559 F.3d 189 (3rd Cir. 2009) (equitable tolling of medical malpractice claim allowed where dental clinic was not obviously a federally-qualified health center).

A third area in which the government's rule would incentivize presenting underdeveloped FTCA claims is cases involving injuries that occur on federal property such as military bases or national parkland. As discussed below (at 15-16), there are thousands of these cases too. Under the government's rule, it might well become routine to submit administrative claims with the federal agency in such cases, merely as a prophylactic measure intended to avoid forfeiting any claim against federal actors that is later uncovered during discovery in private litigation.

The unavailability of equitable tolling in FTCA cases would encourage private litigants to use administrative claims as a *means* to investigate or test the presence of federal action, rather than a *result* of

their own good-faith investigation into federal action. And it is no answer to say that many of these claims would turn out to contain insufficient facts to put an agency on notice of the claim against it, or otherwise to lack merit. That is exactly the problem.

B. By encouraging plaintiffs to present administrative claims before a full investigation, prohibiting equitable tolling would create unnecessary government waste and substantial taxpayer expense.

A review of available FTCA claims data (and studies thereof) underscores the importance of equitable tolling in preventing a flood of "just in case" claims. As the Solicitor General notes (at 51), leading commentators estimate that the government processes or defends between 15,000 and 30,000 FTCA claims each year. See Jayson & Longstreth § 1.01, at 1-8 (July 2014).[2] Most of these claims turn out to lack merit and result in no payment by the government. But the cost of defending such claims is substantial, and the government's rule would multiply the number of administrative FTCA claims that must be processed and defended—perhaps by a hefty factor.

1. The best estimates indicate that the government must defend between 15,000 and 30,000 FTCA claims every year. Of these, only a few thousand reach the courts. In 2013, there were 2,085 civil tort

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[2] This volume, while significant, is orders of magnitude less than the "200 million tax returns each year" that proved an obstacle to equitable tolling in *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

cases filed involving the United States.[3] In 2012, there were 2,039 such cases.[4]

The great majority of FTCA claims—whether they reach the courts or end at the agency—result in no payment from the federal Judgment Fund. In 2013, the Judgment Fund paid some 3,409 FTCA claims. Of those, 1,016 claims were paid after litigation and the remaining 2,393 claims were paid after administrative processing but before litigation.[5] Similarly, in 2012, 3,366 claims were paid out of the Judgment Fund, with 657 arising from litigation and 2,709 arising directly from administrative claims. *Ibid.*

Together, the foregoing figures confirm that the government prevails, making no payment from the Judgment Fund, against most FTCA claims. The government even prevails in roughly 50% to 66% of cases that reach the courts. It stands to reason that a far lower percentage of claims submitted on a "just in

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[3] See United States Courts, Caseload Statistics 2013, "Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2013," available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2013/tables/C03Mar13.pdf (visited Oct. 26, 2014).

[4] See United States Courts, Caseload Statistics 2012, "Table C-3: U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending March 31, 2012," available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C03Mar12.pdf (visited Oct. 26, 2014).

[5] See *Judgment Fund Payment Search Database*, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (visited Oct. 24, 2014).

case" basis will prove meritorious. A rule that bars equitable tolling is virtually certain to increase the number of cases that must be defended but will ultimately prove baseless.

2. The risk that barring equitable tolling would produce substantial government waste is confirmed by other available data from agencies that report the rate at which they deny FTCA administrative claims. As those data suggest, the percentage of non-meritorious claims being submitted to federal agencies is already high.

Between 2010 and 2013, the Transportation Security Administration (TSA) received some 41,600 FTCA claims (10,400 per year).[6] And of the 34,650 on which TSA reached a recorded disposition, it denied about 63.2% (21,900) and approved or settled about 36.8% (12,750) of them. *Ibid.*[7]

Similarly, between 2005 and 2010 the Veterans Administration received an annual average of 1,381 medical malpractice administrative FTCA claims, and had an annual average of 237 medical malpractice FTCA lawsuits filed against it.[8] During that same period, the agency annually denied an average of 1,105 medical malpractice administrative FTCA

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[6] Database of TSA claims data, 2010-2013, available at http://www.tsa.gov/research-center/electronic-reading-room#claimsdata (last visited Oct. 24, 2014).

[7] The high numbers of payments on TSA claims suggests that many of them are lower than $2,500 and thus are not paid out of the Judgment Fund referenced above.

[8] GAO Report, "VA Health Care: VA Uses Medical Injury Tort Claims Data to Assess Veterans' Care, but Should Take Action to Ensure That These Data Are Complete," GAO-12-6R (Oct. 28, 2011).

claims, paying out on 251 such claims. *Ibid.* The agency also resolved an average of 234 malpractice FTCA lawsuits against it per year, with an average of 151 of them resulting in either a settlement or a judgment for the claimant. *Ibid.* The Veterans Administration made payments, on average, for 29% (402) of the 1,381 administrative FTCA claims made against it each year.[9]

3. Public data on what claims *could* have been submitted, but were not, are limited. But the data that exist suggest that a significant percentage of those injured in an area of federal activity—perhaps as many as 9 out of 10—currently submit no administrative claim. With the data discussed above, these numbers underscore why it is important not to incentivize "just in case" administrative claims that a full investigation would prove to be meritless.

One study estimated that, annually, roughly 5,000 serious injuries occur in the national parks.[10] Between them, however, the National Park Service (NPS), Forest Service (FS), Bureau of Land Management (BLM), and Fish and Wildlife Service (FWS) paid out of the Judgment Fund on only 271 claims in

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[9] While the cited GAO Report focuses upon improvements to be made in the collection of data on tort payments by the agency, the data on the Judgment Fund payments for medical malpractice of the Department of Veterans Administration closely tracks the data in the GAO Report, thus tending to corroborate it.

[10] See Scott Breen, *Tort Liability in National Parks and How NPS Tracks, Manages, and Responds to Tortious Incidents*, 30:3 George Wright Forum 247-252 (2013).

2012 and 2013 (217 from administrative claims, 54 from litigation).[11]

Extrapolating from the data concerning the other agencies discussed above—which pay out on roughly 30% to 35% of the claims they receive—one may reasonably infer that the national park-related agencies together received roughly 800 to 900 claims over that two-year period, or roughly 400 to 450 per year.[12] This suggests that less than 10% of the 5,000 people who suffer serious injuries in national parks each year submit administrative claims against the federal government. And while some cases likely involve situations in which the injured party does not believe (or realize) a tort has been committed against him, other cases likely involve situations where the injured party believes she has been injured by a private actor, not the government.

This case, however, could have a serious impact on that 10% figure. We cannot say precisely how many of the remaining 90% of injured individuals would believe there is a possibility of federal involvement—versus how many would reach that conclusion after a reasonable time period for diligent investigation. But at least some portion of these injured parties would believe a wrong was committed by *someone* leading to their injury. Unless they could affirmatively rule out any possibility of a federal cause—and any possibility that such a cause was hidden—prudence suggests that, if equitable tolling were unavailable, they would

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[11] See *Judgment Fund Payment Search Database*, https://jfund.fms.treas.gov/jfradSearchWeb/JFPymtSearchAction.do (visited Oct. 24, 2014).

[12] We were unable to find any readily available public record of the actual number of claims submitted to these agencies.

file a "just in case" claim against the government. And the national parks are just one of many areas where people potentially injured by federal actors will face such incentives.

Even though a substantial influx of claims would be unlikely to materially increase the government's *liability*—because most claims would ultimately prove meritless—it would greatly increase the government's expenditures on claims processing. As the government's own brief acknowledges (at 51-52), processing and investigating FTCA administrative claims can be time-consuming and wasteful.

The government is evidently willing to risk a great increase in the costs of processing claims that are technically timely but ultimately prove to lack merit. It wishes to take on this risk in exchange for a chance to avoid litigation expenses and potential liability on claims that might well be meritorious, but are untimely only because information was unavailable to or even hidden from the claimant. That would be a short-sighted trade-off. It would be inefficient, inconsistent with basic principles of government accountability, and contrary to the FTCA's broad purpose of holding federal agencies accountable to the same extent as private parties are liable for their torts. The judgment below should be affirmed.

C. Current administrative claim volumes reflect a status quo in which practitioners assume equitable tolling could be available in FTCA suits.

The above statistics cannot be brushed aside based on the notion that the equitable tolling rule is a new creation of the Ninth Circuit, or that these statistics already reflect practitioners working under a

bright-line rule that no claims can be presented beyond two years. To the contrary, the FTCA case law shows a broad range of cases where courts have found it appropriate to apply a discovery rule under which the claim accrues only when the plaintiff knows or reasonably should know both that she was injured and what caused her injury. That is doubly true where, as here, there is evidence that the government controlled and concealed crucial facts.

As this Court acknowledged in *Kubrick*, a plaintiff's injury "may be unknown or unknowable until the injury manifests itself," and "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." 444 U.S. at 122. Congress did not design the FTCA's time bar to punish those unlucky individuals who find themselves "at the mercy" of the government to release this information in a timely manner. *Ibid.* Rather, the clock begins to run only when the plaintiff is (or should be) "in possession of the critical facts that he has been hurt and who has inflicted the injury." *Ibid.* The reason why is simple: "[A]rmed with the facts about the harm done to him, [the plaintiff] can protect himself by seeking advice in the medical and legal community." *Id.* at 123.

The discovery rule applied below currently operates in a straightforward manner: Where the federal government is the direct cause of plaintiff's injury, the limitations period does not start to run until the plaintiff knows or reasonably should know of the government's role in that injury. *E.g.*, *Arroyo* v. *United States*, 656 F.3d 663, 669 (7th Cir. 2011) ("An FTCA claim accrues when: (A) an individual actually knows enough to tip him off that a governmental act (or omission) may have caused his injury; or (B) a rea-

sonable person in the individual's position would have known enough to prompt a deeper inquiry."); *Valdez ex rel. Donely* v. *United States*, 518 F.3d 173, 182 (2d Cir. 2008) ("Equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." (internal quotation omitted)).

This is most clearly demonstrated in the arena of medical malpractice. Take, for example, the Seventh Circuit's decision in *Drazan*, 762 F.2d 56. The plaintiff there asserted that doctors at a Veterans Administration hospital committed malpractice by failing to order a follow-up exam upon receiving a radiology report suggesting that her husband, a tuberculosis patient, had developed a tumor in his lungs. *Id.* at 57. Over a year later, the patient died from the same tumor. But his spouse, the plaintiff, did not learn of the government's oversight until she received her husband's medical records ten months after her husband's death. *Id.* at 58. Those ten months meant the difference between a time bar and an actionable FTCA claim: If the clock started upon the death of her husband, she submitted her claim too late; if, however, the limitation period was tolled until she received the records disclosing the government's misconduct, her claim was timely.

Rejecting the government's position that the clock started upon the patient's death, the Seventh Circuit observed that "[t]he cause of which a federal tort claimant must have notice for the statute of limitations to begin to run *is the cause that is in the government's control*, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury." *Id.*

at 59 (emphasis added). Any other rule, the court held, would lead to "ghoulish consequences" that are all too similar to those lurking in the background of this case:

> [A]ny time someone suffered pain or illness or death in a Veterans Administration hospital, he (or in the case of death his survivors) would request his hospital records to see whether diagnosis or treatment might have played a role in his distress * * * * *He could not wait till he had reason to think he had suffered any iatrogenic harm; the two years might have run.*

Ibid. (emphasis added). The Seventh Circuit rightly observed that "such [wasteful] behavior" should not be "encouraged," nor does "anything in *Kubrick* require[] us to encourage it." *Ibid.*

Courts have applied the discovery rule to a host of other claims in which the government's conduct causing the injury was unknown or concealed. Indeed, "courts of appeals have been slightly more forgiving" in applying the discovery rule outside of medical malpractice cases, "deferring the accrual of claims until a reasonably diligent plaintiff *has reason to suspect a governmental connection with the injury.*" *Skwira* v. *United States*, 344 F.3d 64, 77 (1st Cir. 2003) (emphasis added); see also *Garza* v. *U.S. Bureau of Prisons*, 284 F.3d 930, 934 (8th Cir. 2002); *Diaz* v. *United States*, 165 F.3d 1337, 1340 (11th Cir. 1999). This is because "[o]utside the medical malpractice context * * * the identity of the individual(s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement." *Skwira*, 344 F.3d at 77.

The Tenth Circuit recently followed this approach in *Bayless* v. *United States*, 767 F.3d 958 (10th Cir. 2014), where the court analyzed the accrual of an FTCA claim brought by a plaintiff suffering from various maladies eventually traced to nerve gas emitted from an Army testing facility. *Id.* at 959. Despite "doggedly" seeking the cause of her illness for sixteen years, plaintiff did not connect her woes to the government's conduct until 2007. *Ibid.* Only at that point, the court held, did the FTCA limitations' clock begin to run—not in 2005 (as the government argued) when she learned of the mere existence of the Army testing facility. *Id.* at 968-69 (observing that plaintiff had no more than "a lay person's suspicion" until a 2007 test suggested her injuries might be caused by nerve gas).

Courts frequently apply the discovery rule where, as here, the government has concealed or refused to disclose the "critical facts" of the plaintiffs claim. In *Litif* v. *United States*, 670 F.3d 39 (1st Cir. 2012), relatives of a former associate of James "Whitey" Bulger sued upon learning that the FBI exposed Litif as a confidential information to Bulger (who himself was "a 'top echelon' FBI informant"), leading to Litif's murder by Bulger. *Id.* at 40-41. The court rejected the government's contention that the plaintiffs' claims should be barred based on information disclosed in "newspaper stories quoting anonymous sources that Bulger knew of Litif's offer to cooperate"—particularly when "[t]he FBI was formally and informally denying involvement" with Bulger.[13] *Id.*

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[13] In a series of cases arising from the government's "unholy alliance" with Whitey Bulger and the Winter Hill Gang, the First Circuit has stressed that the FTCA's limitations period is tolled until "the plaintiffs acquire[] information

at 44; see also *McIntyre* v. *United States*, 367 F.3d 38, 53, 56 (1st Cir. 2004) (stressing that a suspicion of wrongdoing does not arise to a "duty to inquire" were "the government did not inform the plaintiffs of any investigation, appears to have held the facts revealed in its investigation confidential, and ultimately claimed to have cleared its agents of wrongdoing before the critical dates for accrual purposes").

As these precedents illustrate, the bright-line rule that the government proposes here would represent a major change in the current application of the FTCA, and one with major consequences for the public fisc. No longer able to resort to common-sense tolling rules as they have routinely been applied, risk-averse practitioners and their clients will react by firing off administrative claims rather than carefully investigating the facts. The government's proposed bright-line rule would lead to a drastic increase in meritless "just in case" claims submitted before the two-year mark, just to ensure against the mere possibility that government involvement will be hidden from the plaintiff for over two years. This Court should not adopt that rule.

II. Allowing equitable tolling advances the FTCA's purpose of putting the federal government in the same position as similarly situated private defendants.

Affirmance is independently warranted because equitable tolling advances the FTCA's core aim of

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about the government's role in causing the injury." *Donahue* v. *United States*, 634 F.3d 615, 616, 625 (1st Cir. 2011); see also *Rakes*, 442 F.3d at 22-23; *Callahan* v. *United States*, 426 F.3d 444, 451 (1st Cir. 2005).

putting the federal government in the same position as similarly situated private defendants. As this Court put it in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955), the FTCA has the "broad and just" purpose to "compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable."

The government has consistently invoked the "like circumstances" principle to *limit* the government's FTCA liability in appropriate circumstances, as well it should. In many contexts, the government analogizes itself to private litigants precisely in order to ensure that it receives the benefit of every state-law defense that a private litigant would have. As the government's brief put it in *United States* v. *Olson*, 546 U.S. 43 (2005), "the Court has long recognized that private-person liability is the touchstone for assessing the United States' potential FTCA liability." Reply Br. for Pet 4 (No. 04-759).

Here, the government takes the opposite tack: It seeks treatment *more protective* than that available to private litigants. But in view of the government's broad success in asserting state-law defenses based on the principle that it should stand in the shoes of a private litigant, the government's procedural defenses should be interpreted similarly. Both the text of the FTCA and basic fairness warrants no less.

A. The FTCA places the federal government on "equal footing" with private litigants facing state tort law claims.

In passing the FTCA, Congress made the government liable for its torts "in the same manner and to the same extent" as analogous private defendants. 28

U.S.C. § 2674. In applying the statute, therefore, federal courts are directed to examine how "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Id.* § 1346(b)(1).

Courts interpreting the FTCA thus look to state tort law. The FTCA is not intended "to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States." *Richards* v. *United States*, 369 U.S. 1, 6-7 (1962). Congress declined to "leave to the courts the task of developing a body of federal tort law." See *Hunt* v. *United States*, 636 F.2d 580, 584 (D.C. Cir. 1980). Instead, state law provides the field upon which the FTCA puts the federal government on "equal footing" with private litigants in "like circumstances." See, *e.g.*, *Roelofs* v. *United States*, 501 F.2d 87, 92 (5th Cir. 1974) (the FTCA "is given a broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claims suits on a footing of equality as between private parties within that state.").

Congress's "equal footing" framework furthers the goals of the FTCA by providing fairness and predictability to both sides of a federal tort claim. The legal landscape shaped by state law, and tested by experience in private disputes, provides an interdependent set of protections for both claimants and defendants. Placing the government on equal footing with similarly situated private defendants takes advantage of the familiarity and functionality of this system to promote the equitable and efficient administration of claims. Equitable tolling and discovery rules of claim accrual are part of that system, and therefore should be maintained in the FTCA.

B. The government in FTCA suits regularly employs state law defenses based on analogy to private defendants, and it should likewise be subject to equitable tolling like private defendants.

The United States takes full advantage of the "equal footing" rule, routinely analogizing itself to private defendants where doing so can help it defeat federal tort claims. As one U.S. Attorney's bulletin expresses the point: "Any and all defenses and statutory protections available to private persons under state law are available to the United States and can successfully be raised." See Adam M. Dinnell, *Using the "Private Individual Under Like Circumstances" to Your Advantage: The Analogous Private Liability Requirement Under the Federal Tort Claims Act*, 59 U.S. Atty's Bulletin 1, 10-13.

Occasionally, defenses available to private parties have requirements or qualifications that the United States cannot fulfill because it is not a private actor. But even then, the government argues with frequent success that its activities are the functional equivalent of the government's private analog, warranting application of the defense. FTCA case law provides a host of examples.

For instance, in the wake of Hurricanes Katrina and Rita, the Federal Emergency Management Agency (FEMA) provided emergency housing units to those displaced by the storms. Controversy later emerged over potentially dangerous levels of formaldehyde in the units, and some of the temporary residents filed FTCA claims, alleging that FEMA negligently delayed in warning residents. See *In re FEMA Trailer Formaldehyde Products Liability Litigation*,

668 F.3d 281 (5th Cir. 2012). After the FTCA's discretionary function exception was deemed inapplicable, the government turned to Mississippi and Alabama state law defenses. *Id.* at 285-286. Both jurisdictions had adopted emergency management laws providing that private persons who voluntarily and without compensation donated their real estate for shelter during or in recovery from a disaster would be shielded from civil liability for negligence related to that use. *Id.* at 287-288. The Fifth Circuit agreed that FEMA's provision of emergency trailers was sufficiently similar to such private provision to activate this statutory protection. *Id.* at 289-290. The government has similarly claimed the benefit of recreational land use statutes designed to protect private landowners. See, *e.g.*, *Ewell* v. *United States*, 776 F.2d 246 (10th Cir. 1985) (U.S. protected against suit by motorcycle accident victim by Utah Limitation of Land Owner Liability Act).

Similarly, the government often seeks the benefit of private litigant statutory protections in the medical malpractice arena. In *Scheib* v. *Florida Sanitarium & Benevolent Association*, the plaintiff was awarded $1.03 million in damages for a Navy officer's medical malpractice, which left the plaintiff permanently comatose. 759 F.2d 859, 861 (11th Cir. 1985). Because the plaintiff's insurer had already provided over $400,000 to cover her past medical expenses, the United States invoked a Florida statute allowing damages to be reduced by the amount of payments made by "collateral sources." *Id.* at 861, 863. By its terms, this statute was limited to cases of negligence by physicians licensed in Florida, and the Naval health officer was not so licensed. *Ibid.* The Eleventh Circuit found that the "like circumstances" pro-

vision overcame this difficulty, and allowed the judgment to be reduced. *Id.* at 864. See also *Hill* v. *Smithkline Beecham Corp.*, 393 F.3d 1111 (10th Cir. 2004) (U.S. protected by requirement to seek certificate of review before filing suit against medical professional where statute specified Colorado license and Bureau of Prisons staff in question were not so licensed).

In a similar vein, the United States has repeatedly benefited from medical malpractice award caps—even where it does not meet the express technical requirements of the corresponding state legislation. See, *e.g.*, *Taylor* v. *United States*, 821 F.2d 1428 (9th Cir. 1987); *Owen* v. *United States*, 935 F.2d 734 (5th Cir. 1991); *Lozada* v. *United States*, 974 F.2d 986 (8th Cir. 1992); *Haceesa* v. *United States*, 309 F.3d 722 (10th Cir. 2002). And other areas in which the federal government has wielded the FTCA's "like circumstances" provision as a shield include auto insurance regimes and workers' compensation laws. See, *e.g.*, *Nationwide Mutual Insurance Co.* v. *United States*, 3 F.3d 1392, 1396-1397 (10th Cir. 1993) (U.S. "functionally complied" with requirements of Colorado auto accident law preventing subrogation); *Young* v. *United States*, 71 F.3d 1238 (6th Cir. 1995) (U.S. protected from auto insurer subrogation claim because it provided functional equivalent of security required by Kentucky's no-fault act); *Belluomini* v. *United States*, 64 F.3d 299 (7th Cir. 1995) (Workers' compensation prevents FTCA recovery where a private party in the government's position would be protected from suit under Illinois Workers' Compensation Act); *Willoughby* v. *United States*, 730 F.3d 476 (5th Cir. 2013) (U.S. protected by Texas workers' compensa-

tion law through requirement that contractor provide insurance coverage).

As these examples confirm, federal agencies are zealous in analogizing themselves to private defendants when doing so benefits their substantive defense against FTCA claims. And given the core purpose of the FTCA, that is as it should be. But the FTCA's "equal footing" design—and its purpose of fairly compensating injured private citizens—likewise confirms that the government's procedural advantages should not be enlarged arbitrarily beyond those available to private defendants. It is vital to the FTCA's design to keep equitable tolling available to the same extent that it is available in private tort litigation.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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